

BEFORE LINDA MCCULLOCH, SUPERINTENDENT OF
PUBLIC INSTRUCTION STATE OF MONTANA

IN THE MATTER OF [the student]

OSPI No. 2006-08

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
and ORDER

Before the Hearing Officer is the petition filed by the parents of [the student] on November 6, 2006. A hearing was held on May 8 through 11, 2007. Mediation was previously conducted on December 11, 2006, but was unsuccessful.

The parents of [the student] were represented by their attorneys, Philip A. Hohenlohe and Andrée Larose of the Montana Advocacy Program. The **** School District ("District") appeared through its agent ****, the Special Education Administrator, and was represented by its attorney Jeffrey M. Hindoien.

[The student] presented the following witnesses: Dr. Michelle McCall, [the student]'s psychiatrist; [the student]'s Mother; Dr. Seymore Thomas Hays, III, the Educational Director at Franklin Academy; Bridget Corcoran, [the student]'s Team Leader at Franklin Academy; and [the student]'s Father. Pursuant to a stipulation between the parties, [the student] introduced the deposition testimony of Dr. Yvonne P. Jones, an Educational Consultant, and the deposition testimony of [counselor #1], a Licensed Clinical Professional Counselor.

1 The District presented the following witnesses at the hearing: [school
2 psychologist #1], School Psychologist; [special education teacher #1], Special
3 Education Teacher; [Special Education Administrator], the Special Education
4 Administrator; and [special education teacher #2], Special Education Teacher.

5 The parties stipulated to the authenticity and admissibility of Joint Exhibits 1
6 through 71, all of which were introduced as evidence at the hearing.

7 [The student] alleges that the District failed to provide a free appropriate
8 public education (“FAPE”) and is required to pay for the tuition and related
9 expenses of sending [the student] to a private boarding school for the 2006-2007
10 school year, as well as other expenses his parents incurred because of the District’s
11 failure to make FAPE available. This Hearing Officer agrees.

12 Based on the evidence introduced at the hearing, and the post-hearing
13 submissions of the parties, the Hearing Officer makes the following:

14 **FINDINGS OF FACT**

15 **Elementary School/Background**

16 1. [The student] is a thirteen-year-old young man who has been enrolled
17 in the **** Elementary School District since the fall of 2001, when he began
18 attending third grade at **** Elementary School (“****”) [Elementary School] in
19 [city], Montana. Stipulated Facts at ¶ 1.

20 2. Even before he was identified as a child with a disability, [the
21 student]’s parents knew he was different. Mother at 56-57.¹ From an early age,
22 [the student] was a voracious reader with an extensive vocabulary. Id. at 42. Yet
23 he has difficulty understanding visual information, such as body language or facial
24 expressions. Id. at 42, 44-45. He does not perceive sarcasm, interprets
25 information very literally, and has difficulty perceiving the feelings of others. Id.
26 at 44-45, 49-50. He has difficulty making eye contact and even has a tendency to
27 turn his back on the person conversing with him. Id. at 42-46. While it appears
28

¹ Citations to the hearing transcript are preceded by the identity of the testifying witness.

1 that he is not paying attention, he can repeat a conversation almost verbatim a
2 month later. Id. at 46-47. He has always had difficulty in social interactions. For
3 example, he sometimes tries to initiate social contact by making funny gestures or
4 repeating the same word over and over, which other children find irritating. Id. at
5 47. He has difficulty with fine motor skills, was not able to learn how to tie his
6 shoes, and always had difficulty writing. Id. at 48-49. He has a lot of trouble with
7 organization, and would often forget to put on socks or shoes. Id. at 49. He has
8 always had difficulty with transitions. For example, even when he was three, he
9 needed hours of advance warning and preparation for something as simple as a trip
10 to the store. Id. at 50. He is extremely sensitive to criticism. Id. at 51. He felt
11 confused by the world around him, and different from other children, which caused
12 him stress. Id. at 53.

13 3. [The student] attended a private school in [city] through second grade.
14 Mother at 53. When he started third grade at [the elementary school], he
15 complained that the building was too big, there were too many people, it was too
16 noisy, and he had no friends. Id. at 58. He would say, “I can’t go to school,” and
17 cried on the drive home. Id. He needed an unusual amount of sleep at night and
18 would often fall asleep on the drive home from school, or sleep for a couple hours
19 when he got home. Id. at 59. He started having headaches. Id. at 59-60. By the
20 end of his first semester, his teacher suggested that he be evaluated for a disability,
21 because he was struggling socially, had difficulty processing multi-step tasks, and
22 was stressed and unhappy. Id. at 54-56. That spring, the Child Study Team
23 (“CST”) at [the elementary school] determined that he was eligible for services
24 under the IDEA under the disability category of speech/language impairment.
25 Stipulated Facts at ¶ 2; Exhibit 1.

26 4. The 2002 CST report indicated that [the student] had difficulties with
27 transitions, following unfamiliar routines, working independently, social
28 interactions, reading facial and social cues, and attentional skills in the classroom.

1 His verbal reasoning abilities were much stronger than his nonverbal reasoning
2 abilities and his abilities to sustain attention, concentrate, and exert mental control.
3 As a result, tasks such as comprehending novel information can be more time-
4 consuming, difficult, and mentally draining for [the student] than for others. The
5 school psychologist, [school psychologist #2], concluded that his overall pattern of
6 strengths and needs was consistent with a nonverbal learning disability (“NLD”),
7 and that his strong verbal skills provided an “illusion of competence” masking his
8 difficulties in the nonverbal area. She also noted that [the student] and others were
9 “painfully aware that social interactions are difficult for him.” Stipulated Facts at ¶
10 3; Exhibit 1. [The student] also had difficulty controlling the volume of his voice,
11 and developed a tendency to give up easily when unsure of himself. Exhibit 1.
12 Like most children with NLD, [the student] had difficulties with math concepts,
13 handwriting, adapting to new or complex situations, visual spatial tasks and
14 solving nonverbal problems—but showed strength in reading decoding, spelling,
15 verbal memory, and speech output. Mother at 63-64; Exhibit 1.

16 5. The speech pathologist at [the elementary school] noted that [the
17 student] would benefit from small group instruction and/or group activities
18 designed to teach him and allow him to practice using pragmatic communication
19 skills, and he appeared very stimulable for increased use of pragmatic language
20 and communication skills. Exhibit 1 at 2.

21 6. In June 2002, [the student]’s parents took him to be evaluated by Dr.
22 Suzanne Dixon, who also diagnosed him with NLD, and recommended that he be
23 provided a social skills curriculum, noting that [the student] would not learn how
24 to interact with other children without specific instruction. She suggested that [the
25 student]’s educational program needed to be modified so that information is
26 presented in verbal form. She also suggested an occupational therapy evaluation,
27 some integration of occupational therapy activities in the curriculum, and regular
28 psychological counseling. Stipulated Facts at ¶ 4; Exhibit 11 at 10-11.

1 7. Since the initial diagnosis, it has become increasingly clear that [the
2 student] fits the NLD profile. Children with NLD have auditory skills that are
3 stronger than their visual and motor skills. They have an extremely slow
4 processing speed, meaning they take a long time to process information,
5 particularly nonverbal information. Importantly, they have difficulty with
6 advanced thinking, time management, organizational skills, and other executive
7 functions. They have a hard time managing their emotions and are prone to
8 anxiety which often causes them to shut down and become unable to process
9 information. On the other hand, they typically have phenomenal rote memories,
10 good reading decoding, and good experiential memories. Hays at 330-33.

11 8. It is estimated that between 75 and 90 percent of social
12 communication consists of nonverbal information such as posture, tone of voice,
13 and facial expressions. Children with NLD have difficulty interpreting such
14 nonverbal information accurately. In addition, because their processing speed is
15 slow, they are not able to interpret information and respond in a timely manner.
16 By the time they interpret information and formulate a response, the topic of
17 conversation has already changed. Hays at 333-35. Children with NLD are very
18 concrete, interpret information very literally, and have difficulty with abstract
19 reasoning. They have difficulty interpreting sarcasm or metaphors. Id. at 337-38.

20 9. Children with NLD typically have anxiety disorders, and depression
21 or other mood disorders. This may be caused by their awareness that they are not
22 “normal” and that they interpret the world differently. They also realize that when
23 they enter new situations, they will not be able to make sense of their environment
24 quickly. Hays at 340-41. Their difficulty understanding the social cues, which
25 others take for granted, typically causes a great deal of stress. Jones Depo. at 18-
26 20. This is consistent with the documentation of Pamela Tanguay finally presented
27 by ****, the Special Education Administrator, to the (2006) CST Exhibit 50.

28 10. Although described as a “learning disability,” NLD is in fact very

1 different from typical learning disabilities. Learning disabilities other than NLD
2 are almost all language-based learning disabilities, which affect a child in a
3 particular area such as reading decoding. In other aspects of their lives, such as
4 athletics or social interactions, children with learning disabilities are relatively
5 successful. NLD, by contrast, affects a child's ability to function in every area of
6 his life, such that he often cannot find a single area in which he is successful. Hays
7 at 335; 344-45.

8 11. NLD usually begins to manifest itself around third or fourth grade,
9 and by middle school, these children typically are really struggling. The need for
10 increased independent organizational skills and more demanding rules become
11 overwhelming, as do the changing classes, larger class size, and struggles with peer
12 relationships. Hays at 342-43; Mother at 79-80. Because of the well-developed
13 verbal skills of NLD children, it is difficult even for professionals to appreciate the
14 seriousness of the disability, and teachers often assume that the child is simply
15 being lazy or refusing to work. Hays at 344; Jones Depo. at 21-22.

16 12. Children with NLD do not function well in a typical classroom
17 setting. It is extremely confusing for them to have a teacher draw a picture on a
18 blackboard, and they have difficulty taking notes. Therefore, they are unable to
19 look at a picture, listen to the teacher, and take notes at the same time. Hays at
20 335-36. Because of their social deficits, they tend to get left out of group projects
21 or activities. Id. at 336-37. Because of their difficulties with organization, they
22 need a predictable, sequential routine, without surprises. Id. at 338-39. New
23 situations, even minor changes, can cause extreme anxiety. Id. at 339. Typically,
24 NLD children tend to withdraw or try to escape from stressful situations. Id. at
25 339-40. They struggle in the areas of writing and math. Id. at 341-42. They do
26 not do well in large school settings, because they are easily overstimulated and
27 overwhelmed. Id. at 330. It is common for children with NLD to end up in some
28 sort of residential treatment program. Id. at 326.

1 13. In the present case, IEPs were prepared for [the student] in April
2 2002, and March 2003, to cover his fourth and fifth grade years at [the elementary
3 school]. Under these IEPs, [the student] received special education services in the
4 area of speech/language, with annual goals and objectives in the areas of pragmatic
5 language/ communication-interaction and behavioral or study skills. During fourth
6 and fifth grade, [the student] received regular quarterly progress reports describing
7 his progress on his goals and objectives. Stipulated Facts at ¶ 5; Exhibits 2-5.
8 During this time, [the student] worked closely with the speech pathologist in and
9 out of the classroom, made progress toward his goals, and performed well
10 academically. Mother at 66-70; Exhibits 3& 5. He enjoyed school, but did not
11 like unstructured time such as recess, because of his difficulties with social
12 interactions. Mother at 72-73. This is consistent with the documentation of
13 Pamela Tanguay finally presented by ****, the Special Education Administrator,
14 to the (2006) CST Exhibit 50.

15 14. On March 26, 2004, during [the student]’s final year at [the
16 elementary school], a meeting was held to prepare an IEP for the following year at
17 *** Middle School (“****”) [the middle school]. With respect to his annual goals
18 in the area of study skills, the IEP team found that [the student] was inconsistent in
19 being on task or getting his work completed and turned in on time. He also had a
20 difficult time requesting help to get his needs met. When redirected, however, he
21 was capable of doing his work. He was easily hurt by criticism, so any redirection
22 needed to be gentle. Stipulated Facts at ¶ 6; Exhibit 6 at 4. With respect to his
23 goals in the area of pragmatic language/communication-interaction, [the student]
24 had made several friends and frequently initiated having them over to his house.
25 He still tended not to make eye contact, however, and sometimes appeared
26 uninterested or non- responsive to comments and questions from others. The
27 subtleties of communication and social interaction were difficult for him and he
28 rarely observed or understood others’ body language or interpreted their tone of

voice. The team noted that he would continue to benefit from small group instruction and skill practice in communication pragmatics. Stipulated Facts at ¶ 7; Exhibit 6 at 5.

15. The 2004 IEP provided that [the student] would participate in the general education program with certain modifications and accommodations. He would receive services in the areas of both speech/language and study skills. His annual goal in the area of study skills was to demonstrate appropriate classroom behaviors, including maintaining a B average in all his classes. His annual goal in the area of pragmatic language/communication-interaction was to express questions and concerns verbally to trusted peers and adults (as opposed to engaging in odd social behaviors). The IEP noted that progress reports would be sent to [the student]'s parents on a quarterly basis. Stipulated Facts at ¶ 8; Exhibit 6 at 3-5. [The student]'s teacher at [the elementary school] strongly believed he should be expected to earn As and Bs, and that if he did not, it was a sign that something was wrong. Mother at 81. Mrs. ***, [the student]'s regular education teacher, objected to the IEP as drafted because it required [the student] to maintain a C average for the semester. [The elementary regular education teacher] felt strongly the grade average should be an A or B, reviewed quarterly, and that if [the student] was getting C's it would be a signal that he wasn't understanding the material or was stressed. Mother at 81; Exhibit 6 at 3-5.

16. At the IEP meeting, [the student], his parents, and the school staff all identified concerns and needs regarding [the student]'s transition to middle school. His parents referred to [the student]'s high anxiety level and his stated concerns that [the middle school] was too big and too loud, with too many people. There are over 700 students at [the middle school] and the class sizes in the regular education classes are 20 to 24 students. Mother at 75-79; Stipulated Facts at ¶ 9; Exhibit 6 at 1.

6th Grade (2004-2005)

1 17. [The student] entered [the middle school] in the fall of 2004. For the
2 first semester, he received a C+ in Comm Arts and in Math, and the rest of his
3 grades were As and Bs; and he attended school regularly. Stipulated Facts;
4 Exhibits 55 & 56. Although his academic performance was acceptable, [the
5 student] was struggling. Within the first couple weeks of school, he began being
6 teased by other students who called him “faggot”, “queer” or “gay.” He became
7 very anxious, and worried about his school performance, whether his mother
8 would pick him up right after school, or whether he would be beaten up by other
9 students. He struggled with his homework. For example, he had an unusually
10 large amount of math homework because he could only complete one or two
11 problems at school. He had trouble understanding the math and science textbooks.
12 He had trouble with organization and would forget books and assignments. On
13 some afternoons after school, [the student] would cry or put his face in his lap.
14 Sometimes he would fall asleep on the drive home and sleep until dinner. On
15 some mornings, he would say, “Oh, I can’t do it,” but he was still able to attend
16 school. Mother at 85-98.

17 18. [The student] was concerned that his science teacher did not like him
18 and yelled at him every day. [The student]’s mother spoke to the teacher and
19 found out that he regularly had to chastise a group of students who acted out.
20 Although [the student] was not part of this group, he misunderstood and believed
21 those comments were directed at him personally. Mother at 95-96.

22 19. [Speech-pathologist] was the speech/language pathologist at [the
23 middle school] who was responsible for providing speech/language services to [the
24 student] during his 6th grade year. She met with [the student] for therapy sessions
25 in groups with one or two other students, and attempted to work on [the student]’s
26 nonverbal communication skills such as eye contact and body language .
27 Stipulated Facts at ¶ 26. Although [the student] was supposed to see her one hour
28 a week, he often failed to go. Mother at 101. In the spring, after [the student]’s

1 attendance declined, [the speech-pathologist] recalls "hardly ever" meeting with
2 him. Stipulated Facts at ¶ 26. Although he was supposed to be receiving services
3 in the area of study skills, he did not appear to be receiving such services because
4 he hardly ever filled out his assignment notebook, and none of his notebooks were
5 organized. Mother at 101-02.

6 20. [The middle school] did not provide any kind of mental health
7 counseling for [the student], and in October 2004, his parents started taking him to
8 Pat Kemp, a mental health counselor, to help him with his anxiety about not being
9 picked up immediately after school, and with the teasing and bullying he was
10 experiencing. [The student] continued to see Pat Kemp through September 2005.
11 Mother at 87-89.

12 21. By the end of his first semester, [the student]'s problems had not
13 improved – in fact he was doing worse. Mother at 100. Upon his return to school
14 in January of 2005 after the holidays, [the student]'s attendance and performance
15 dramatically deteriorated. Mother at 103-04; Stipulated Facts at ¶ 10; Exhibits 55
16 & 56. He began having extreme anxiety about going to school and could not bring
17 himself to go to school. Mother at 104-05. On the advice of Pat Kemp, [the
18 student] and his mother agreed that they would drive to school every day and he
19 would try to go in. Id. at 106-07. When they neared the school, [the student]
20 would turn pale, cry, clench his fists, bang his head, and beg to go home. Id. at
21 108. His mother kept plastic bags in the car, because [the student] would often
22 throw up in the car in front of the building. Id. at 108-09. On some days, his
23 anxiety was so great that he could not even enter the building, and his mother
24 would take him to the public library, and try to get him to enter the school building
25 later in the day. Id. at 109-12. On other days, his mother was able to get him to
26 the vestibule or inside the building by holding him by the arm. Id. at 110-11.
27 Sometimes, she physically pulled [the student] out of the car and tried to push him
28 into the building. Id. at 113. On one occasion, she tried to leave him and drive

1 away, but he began running after the car. Id. at 113. Another time, she got him out
2 of the car, locked the car doors, and drove off. As she drove off, however, she saw
3 that [the student] was walking away from the school. Id. at 113-14. The school
4 staff, including ****, [the student]’s special education case manager, was aware of
5 the difficulties [the student] was having. Id. at 114-15.

6 22. [The student] was sometimes able to attend school for all or a portion
7 of the day. Exhibit 56. On some days, he had to call his mother to be picked up
8 early. Mother at 122-23. His teachers were quite concerned not only with [the
9 student]’s excessive absences, but also because of his unusual requests to call his
10 mother, his tendency to repeat the same phrase over and over again, his suicidal
11 ideation, poor attention and self-control, excessive worrying, disrupting other
12 students, his distractibility, and his tendency to become easily upset and cry.
13 Stipulated Facts at ¶ 14; Exhibit 10; Exhibit 11 at 18, 22. [The student] would cry,
14 pace, look out the window, ask to call home, refuse to work, and turn his back on
15 the teacher. Exhibit 10 at 1.

16 23. One of [the student]’s primary fears was that he would have a panic
17 attack at school. Mother at 119. When he did have a panic attack at school he
18 would break down and cry. He was mortified at the thought of having a panic
19 attack in front of his friends and peers. Id. at 116-117. In addition, he was simply
20 overwhelmed by the problems of his social ineptness and his difficulty following
21 what was being taught in class. Id. at 119, 268. He referred to himself as a “total
22 freak” because he was not able to attend school, and was very aware that he was
23 different from other children. Id. at 120-21. On those days when he was able to
24 attend, he was proud of himself. Id. at 123-24.

25 24. [The student]’s mother asked [the middle school] staff for help. She
26 repeatedly requested that [the student] be provided a consistent adult contact
27 person to develop a rapport with him and meet him at the car or at the school door
28 every morning to help him get in the building. She was told that there was no one

1 available. Mother at 115-119. In addition to someone meeting him in the
2 mornings, [the student] needed to have a single adult at school who was available
3 to sit down with him when he was overwhelmed by anxiety, but again [the middle
4 school] staff told [the student]'s mother that there was no one available. Id. at 124-
5 26. At [the middle school], unlike at [the elementary school], [the student] was
6 never able to form a trusting relationship with even one adult. Id. at 302-03.

7 25. In February 2005, [the student]'s parents took him to see Dr. Michelle
8 McCall, a child psychiatrist. Dr. McCall diagnosed [the student] with panic
9 disorder and major depressive disorder, which were severe enough that he was
10 experiencing auditory hallucinations. McCall at 9-11. During [the student]'s panic
11 attacks, he felt like he might die or something horrible would happen. Id. at 12-13.
12 Dr. McCall saw [the student] regularly thereafter, and had seen him as recently as
13 February 2007. Id. at 10. When she began treating [the student], his anxiety did
14 not seem particularly focused on [the middle school], but by the fall of 2005, his
15 anxiety was largely focused on [the middle school]. Id. at 15-16, 36. His ability to
16 successfully attend [the middle school] and function in that setting never improved.
17 Id. at 16. She treated [the student] with numerous medications, and he has been on
18 Effexor XR since January 2006, which has helped with his anxiety, but did not
19 reduce it to the point where he was able to attend [the middle school]. McCall at
20 16-17, 26-27. Dr. McCall agreed that [the student] has NLD, and found that his
21 difficulty interpreting social cues and his poor social skills played a significant role
22 in his anxiety. Id. at 14-15. [The student] needed direct instruction in developing
23 social, pragmatic, and coping skills in the setting in which the interaction occurred.
24 (Jones Dep. at 23-25). The middle school environment, by virtue of its complexity
25 and expectation of more independent activity expected of students, creates
26 increased problems for children with NLD (Jones Dep. at 19-20).

27 26. An IEP meeting was held on February 11, 2005 to discuss [the
28 student]'s problems. [The student]'s mother informed the team of [the student]'s

1 history with anxiety, and that he was on medication. She explained that [the
2 student] was highly anxious and refusing to go to school. The team agreed that
3 [the student] would be permitted to carry a cell phone and to call his mother during
4 certain appropriate times in designated places, and set up several “safe zones”
5 where [the student] could go if he was anxious, provided his teachers felt it was an
6 appropriate time for him to go. Stipulated Facts at ¶ 11, 13; Exhibit 9; Exhibit 11
7 at 18. On one such occasion, [the student]’s teacher told him to wait for the bell
8 because there were only a couple minutes of class left, which served to increase his
9 anxiety. Mother at 122-23. The team decided not to make any determination as to
10 whether [the student] needed additional supports until the team reconvened.
11 Exhibit 9. The program devised at the February 11 meeting was not successful.
12 Id. at 130; Exhibit 56.

13 27. The triennial CST process was initiated in the spring of 2005 and the
14 CST team met on March 22, 2005 to discuss the report. The [middle] school
15 psychologist, [school psychologist #1], agreed with the previous findings that [the
16 student] was a student with nonverbal learning deficits. She found a 31-point
17 discrepancy between his verbal IQ (134) and his performance IQ (103). Stipulated
18 Facts at ¶ 12; Exhibit 11 at 19. She placed [the student] within the high average
19 superior range of intellectual abilities over all. Exhibit 11 at 19. She also
20 confirmed that [the student] had been highly anxious since returning to school, and
21 reported a high level of social and emotional maladjustment and suicidal ideation.
22 Stipulated Facts at ¶¶ 13-14; Exhibit 11 at 18, 22. She observed that NLD children
23 are easily overwhelmed and may develop secondary issues related to stress and
24 anxiety. Stipulated Facts at ¶ 15; Exhibit 11 at 22.

25 28. [School psychologist #1] wrote that [the student] needed to continue
26 to be provided with a predictable and consistent daily school routine, and should be
27 given verbal cues before upcoming changes and transitions. In addition, she
28 determined that the IEP should stress compensatory strategies and work to enlarge

1 [the student]’s repertoire of coping mechanisms. She found that without continued
2 special education support, modifications, and accommodations, it was unlikely that
3 [the student] would be successful in school. Stipulated Facts at ¶ 16; Exhibit 11 at
4 22. The CST report also indicated that [the student] could be expected to perform
5 at grade level (or above) academically, if given extra time to accommodate his
6 slower processing speed at certain tasks. Stipulated Facts at ¶ 18; Exhibit 11 at 3.

7 29. As part of the 2005 CST report, [the speech-pathologist] reported that
8 [the student]’s social communication skills had not progressed, and he still
9 demonstrated poor eye contact and impolite body language, such as turning his
10 back to someone who was talking to him. She concluded that, “For unknown
11 reasons, [the student] tends to not use his best communicative interaction skills on
12 a daily basis in the classroom in subtle ways that are noticeable to his peers and
13 teachers.” Stipulated Facts at ¶ 17; Exhibit 11 at 6.

14 30. The CST concluded that [the student] was eligible for special
15 education services under the “other health impairment” category and recommended
16 that [the student] receive services in the areas of study skills and social-emotional-
17 behavioral. The CST also reported that the school staff and outside professionals
18 would need to collaborate to identify/modify strategies for decreasing [the
19 student]’s anxiety, improving his school attendance and increasing his work
20 completion. Stipulated Facts at ¶ 17; Exhibit 11 at 1, 12. On May 24, 2006, the
21 CST report was supplemented to include the fact that [the student] had been
22 diagnosed by Dr. Michelle McCall with panic disorder without agoraphobia, and
23 major depression. Stipulated Facts at ¶ 18; Exhibit 11 at 7, 24.

24 31. By the time of the CST meeting, [the student]’s mother was concerned
25 that his teachers did not understand the nature of NLD, the severity of his anxiety,
26 or the relationship between the NLD and the anxiety. Mother at 134-39. For
27 example, [the student]’s art teacher admitted that he had no idea that [the student]’s
28 anxiety had reached the level it had, and his science teacher admitted that he did

1 not know that [the student] interpreted information literally. Id. at 136-37. For this
2 reason, [the student]’s mother provided the CST team with written information on
3 NLD and anxiety, for [the student]’s teachers. Id. at 134-35; Exhibit 11 at 13. [The
4 special education case manager], [the student]’s special education teacher, told [the
5 student]’s mother that his teachers could not be expected to read all of the NLD
6 information she provided. Mother at 135-36. [The student]’s mother informed the
7 CST team that the plan for [the student] had not been working. Id. at 138; Exhibit
8 11 at 13.

9 32. By April 2005, [the student] was expressing active suicidal thoughts.
10 McCall at 18. He said he was going to kill himself and that he wished he was
11 dead, and on two occasions, he tried to jump out of a moving car on the highway
12 on the way to school. Mother at 121-22. His parents called Dr. McCall, and she
13 advised that he needed to be hospitalized. Id. at 121-22. McCall at 18. [The
14 student] was hospitalized at Shodair Children’s Hospital for two weeks. Stipulated
15 Facts at ¶ 19; McCall at 18-19. Dr. McCall and the admitting physician at Shodair
16 agreed that [the student] was in imminent danger of harming himself. McCall at
17 19. The reason [the student] had become suicidal was that he was having less and
18 less success in entering the school building, causing him to lose self-confidence
19 and feel remorseful and worthless, and he was becoming increasingly
20 overwhelmed, agitated, and panicked. Id. at 19-20.

21 33. School officials met with [the student]’s mother and [the student]’s
22 providers on April 11, 2005 to discuss how best to transition [the student] back into
23 the [middle school] setting from Shodair. Stipulated Facts at ¶ 19; Exhibit 15.
24 [The student]’s mother again requested, pursuant to a recommendation from
25 Shodair staff, that an adult contact be available at least to meet [the student] at the
26 door to help him get in the building. [The student]’s mother was again told that no
27 one was available. Mother at 147-48, 303.

28 34. [The student]’s attendance in sixth grade improved after his

1 hospitalization at Shodair, but he was still struggling. Dr. McCall reported that
2 [the student]'s anxiety level while sitting at his desk would range from 5 to 7 out of
3 10, and although he did not always show it outwardly, his anxiety was so severe
4 that he was not absorbing any information. McCall at 25-26. When in class, he
5 would do things like chew on inappropriate material, lay his head on the table, and
6 be off task. Mother at. 167. [The middle school] staff did not expect much of him
7 academically, and he was "not doing a whole lot in the classroom," or in some
8 cases producing any work. [School psychologist #1] at 433-34, 460. [The
9 student]'s mother believed he was working very hard to manage his anxiety and
10 attend school because he was afraid of being returned to Shodair, but was not able
11 to focus on his education. Mother at 146-47, 153, 167. There were still a lot of
12 days when he did not want to go to school, but he was able to go. Id. at 148. He
13 was exhausted after school, and his headaches returned. Id. at 154. The principal
14 observed that [the student] had difficulty with social interactions with other
15 children during unstructured time such as lunch. Stipulated Facts at ¶ 24.

16 35. The parties met on April 27, 2005 to develop an IEP for the next
17 school year -- [the student]'s 7th grade year. That IEP provided that [the student]
18 would spend all his time in a regular education setting with certain
19 accommodations and modifications, including structured settings, preferential
20 seating, presentation of instructional material in oral form as much as possible,
21 predictable daily routine and adult help with peer relationships. [The student]'s
22 only annual goal was that he would demonstrate appropriate classroom behaviors.
23 His objectives under this goal were staying on task, not interfering with other
24 students, completing assignments, asking for help appropriately, and redirecting
25 himself appropriately when he was feeling bored. Stipulated Facts at ¶¶ 20, 23;
26 Exhibit 22 at 3-4. The 2005 IEP differed from the 2004 IEP in that it did not
27 indicate that special education services would be provided in the area of study
28 skills. Compare Exhibit 6 at 3, with Exhibit 22 at 3. To meet his study skills

1 objectives, however, [the student] needed specific instruction. Mother at 158-60.
2 In addition, even though [the student] was expected to perform at grade level or
3 above, the IEP no longer contained any objective related to his grades.

4 36. In addition, despite the recommendation in the CST report that [the
5 student] receive services in the areas of both study skills and social-emotional-
6 behavioral, the IEP team decided to no longer include an annual goal related to
7 social or communication skills and decided that [the student] would no longer
8 receive direct special education services in the speech/language area. The reason
9 for the change was the perception that, although [the student] was not meeting his
10 goals and objectives in this area, he had learned and knew the skills being taught in
11 the direct therapy and the concerns centered on his use of those skills outside of the
12 direct therapy environment. Stipulated Facts at ¶ 21; Exhibit 22. [The student]’s
13 parents were not given an opportunity to consult with the school about this
14 decision. Mother at 599-600. The IEP noted that [the speech-pathologist] would
15 be available for consultation if necessary, but no such consultation occurred.
16 Stipulated Facts at ¶ 22.

17 37. It was not appropriate to discontinue the social and communications
18 skills services from the IEP. Both of [the student]’s CST reports had noted how
19 important such services were for [the student] Dr. Dixon’s report completed June
20 27, 2002 stated that the “School program should include a social skills curriculum.
21 [the student] will not learn how to interact with other kids without specific
22 training.” Dr. Jones agreed with this conclusion (Jones 31-32), and [the special
23 education administrator] admitted that [the student] needed social skills training.
24 [Special education administrator] at 572-73. [The student] clearly was still
25 struggling in this area and was not meeting his goals. Yet [the student] was not
26 provided a social skills curriculum ([special education teacher #1] at 507-08), or
27 even any direct services in the area of social skills or pragmatic communications
28 skills. For [the student] to be able to function, it was crucial that he receive direct

1 assistance and training to use appropriate social and communication skills outside
2 the therapy environment, such as in the classroom, and by failing to provide such
3 services, the IEP was not sufficient to meet his needs. Mother at 158; Jones Depo.
4 at 29, 31-33.

5 38. The IEP also included a Positive Behavior Support Plan stating that
6 [the student] should be treated like any other student, except when he has a panic
7 attack, in which case [the student] should be permitted to go to the nurse's office
8 right away. In addition, [the student] would be permitted one phone call home per
9 day. Stipulated Facts at ¶ 22; Exhibit 22 at 7. This plan was clearly insufficient to
10 meet [the student]'s needs. The CST had specifically noted that [the student]
11 needed to learn coping mechanisms, and the plan provided nothing to help teach
12 [the student]'s coping strategies. [The student] needed an adult who was
13 consistently able to help him when he experienced anxiety or a panic attack.
14 Mother at 163-64. He needed teachers who were knowledgeable enough to
15 recognize the onset of a panic attack and who could help calm [the student] before
16 it escalated. Id.

17 39. [The student]'s mother was also concerned that the 2005 IEP did not
18 provide [the student] with smaller class sizes or with any relief from having
19 multiple teachers throughout the day. Mother at 161-63. She had talked with [the
20 special education case manager] and [school psychologist #1] on several occasions
21 regarding the need to have [the student] in smaller classes. Id. at 1632-63. He
22 needed a safe and consistent classroom environment which included direct
23 supervision each day so he could maintain his bearings.

24 40. From January through April 2005, [the student] missed at least thirty
25 full school days, and thirteen partial days. By mid-March, he had an F or
26 incomplete in all his classes because of missing work. By the end of the second
27 semester, he had three F's, one D-, one B, one B-, and an A- in P.E. His
28 attendance for the second semester did not meet the [district] School District's

requirements for school attendance. Stipulated Facts at ¶ 24.

41. The March 2004 IEP had required that progress reports be sent out quarterly in sixth grade in the areas of study skills and pragmatic language/communication; and the March 2005 IEP provided that progress reports would be provided on a semester, quarterly, and mid-quarterly basis in the area of study skills/behavioral. Exhibit 6 at 4-5; Exhibit 22 at 4. [The special education case manager], however, prepared only a single progress report at the end of the year (June 8, 2005) regarding [the student]'s study skills/behavioral goal, with that report indicating that [the student] was still struggling to demonstrate appropriate classroom behaviors. He did not meet his goal or objectives in this area and no other progress reports were prepared during [the student]'s sixth grade year for his study skills goal. Stipulated Facts at ¶ 25; Exhibit 24. As for his language/communication goals, [the speech-pathologist] prepared progress reports on November 4, 2004 and January 21, 2005 that indicated [the student] had either “not worked on” or made only “minimal gains” on all of the objectives related to his goal of expressing himself verbally in an appropriate manner rather than engaging in odd social behaviors. No other progress reports were prepared in this area during [the student]'s 6th grade year. Stipulated Facts at ¶ 26; Exhibit 7. The progress reports prepared by [the speech-pathologist] contained no information regarding [the student]'s present level of performance. Exhibit 7 at 3-4.

7th Grade (2005-2006)

42. [The student] returned to [the middle school] and began his 7th grade year in the fall of 2005. Although his IEP required that he be provided various accommodations, those accommodations were not provided in a consistent manner. It was very important that [the student] have preferential seating close to the teacher with minimal distractions because he is easily distracted by all the visual stimuli in class. Mother at 141-42. For example, his teacher at [the elementary school] had [the student] sitting facing a wall. [The student]'s mother observed,

1 however, that in at least two of his classrooms at [the middle school], this
2 accommodation was not provided. In fact, one teacher had [the student] sitting in
3 the back, facing the window. Id. [Special education teacher #1], [the student]’s
4 case manager in seventh grade, admitted that she did not know whether [the
5 student] was actually provided preferential seating on a consistent basis. [Special
6 education teacher #1] at 504. Although the IEP called for “clear and consistent
7 expectations,” [special education teacher #1] did not believe [the student] was
8 treated any differently than any other students in this regard. Id. at 503-04.
9 Although the IEP stated that instructional material should be provided in oral form
10 as much as possible, [the student] should orally demonstrate knowledge as much as
11 possible, and that [the student] should have a predictable daily routine, [the
12 student] was treated no differently than other students in those regards. Id. at 504-
13 05. Although the IEP required adult help for peer relationships, teachers did not
14 take any proactive steps to help [the student] in that area. Id. at 505.

15 43. Not only were the accommodations not provided, [the student]’s
16 teachers were not sufficiently made aware of his unique needs. To educate his
17 teachers about his needed accommodations, an overview of those accommodations
18 was prepared by [the student]’s case manager and provided to his teachers, which
19 simply listed the accommodations without explanation as to how they should be
20 provided or why. Stipulated Facts at ¶ 23; Exhibit 25. This overview was not
21 sufficient to ensure that proper accommodations would be provided in any
22 appropriate way. It did not explain the nature of his disability or his unique needs,
23 or even mention that [the student] had NLD. It did not define phrases such as
24 “structured setting” or “adult support with peer relationships.” Indeed, [special
25 education teacher #1] admitted that some of [the student]’s teachers may not have
26 known that [the student] had NLD. [Special education teacher #1] at 506.

27 44. After the first week or so of school, other children began teasing [the
28 student] about being hospitalized at Shodair and called him “retarded,” “psycho,”

1 and “mental.” Mother at 169-70. [The student]’s anxiety increased and within
2 about a month he again began to have problems with attendance. Stipulated Facts
3 at ¶ 27; Mother at 170; Exhibit 56. [The student] and his parents made the same
4 agreement that he would try to attend school every day, and his mother struggled to
5 get him to school just as she had the year before. Mother at 170-73. [The
6 student]’s attendance, however, was even worse than it had been the previous year.
7 Id. at 172; Exhibit 56.

8 45. After [the student]’s attendance began to decline, his mother spoke to
9 [special education teacher #1] and requested that the school prepare a brief weekly
10 list of what [the student] was supposed to be working on at school, so she could
11 help him keep up with his work. Mother at 174-75. [Special education teacher #1]
12 said this was not possible because it created too much work for the teachers, and
13 she suggested that [the student] be home-schooled. Id. at 175-76. When [the
14 student]’s mother explained that this was not feasible, [special education teacher
15 #1] then suggested homebound services, but the principal rejected the idea because
16 it was expensive and was only for children who were ill. Id. at 176.

17 46. That fall, [the student]’s parents began taking him to see Eric Wahler,
18 a mental health counselor, for help in ensuring that [the student] could attend
19 school. Wahler Depo. at 9-10. Wahler met with [the student] once a week from
20 September 2005 through April 2006, and got to know [the student] pretty well. Id.
21 at 12-13. He determined that [the student] had panic disorder and separation
22 anxiety. Id. at 10-12. [The student]’s anxiety was one of the most severe cases
23 that Wahler had ever seen. Id. at 13-14. He found that [the student’s] social skills
24 were “pretty marginal” as a result of the NLD and had a very negative impact on
25 his ability to get along with other children. Id. at 14-15. The NLD posed a
26 significant impairment to his progress because his diminished ability to interact in
27 his social environment caused the anxiety to be constantly “retriggered.” Id. at 13-
28 15; 25-26.

1 47. Wahler determined that [the student]’s anxiety was particularly
2 focused on [the middle school], because he did not trust that the school could
3 consistently create a safe environment, and his confidence was constantly being
4 undermined at school. For example, on one occasion, [the student]’s teacher
5 required him to give an oral presentation when he did not expect it, and was
6 unprepared. On another occasion, [the student] caused his class to miss out on a
7 pizza party because of his poor performance on an assignment. Wahler Depo. at
8 15-18. Just the sight of the [the middle school] building was enough to trigger
9 extreme anxiety or a panic attack. Id. at 21-22. [The student] required
10 interventions with peers at the time of the interaction to improve his social skills
11 and prevent his anxiety from being retriggered. (Whaler Deposition pgs. 29-30
12 and 14). It is unlikely that [the student] could have identified his problems with
13 social interactions on his own or understood the negative responses he received.
14 (Whaler Deposition pg. 34). The failure of the District to provide these
15 interventions caused him to feel unsafe in the school environment. [The student]’s
16 NLD and lack of social skills significantly contributed to his anxiety. (Whaler
17 Deposition pgs. 15, 17, 21 31).

18 48. Wahler tried cognitive therapy, breathing exercises, a reward system,
19 and other treatments, but nothing worked. [The student]’s school-related anxiety
20 did not improve and probably got worse. For many children with anxiety issues,
21 just developing a relationship with a neutral adult can be key to overcoming their
22 problems. [The student]’s problems, however, had become “much more severe
23 than that.” Wahler Depo. at 18-21. Wahler sometimes met with [the student]
24 before school, and by the end of the session, [the student] became pale and
25 frightened, or irritable and argumentative. Id. at 16-18. Wahler believed that [the
26 student] wanted to attend school and be successful in school. Id. at 19. There were
27 times when [the student] had suicidal thoughts and Wahler determined that suicide
28 was a real risk. During such times, Wahler would try to reduce the pressure on

1 [the student] to attend school because further failure increased the risk of suicide.
2 Id. at 23-24. [The student]'s self esteem was very poor, primarily because of his
3 lack of success at school. Id. at 28-29.

4 49. [The student]'s parents were extremely cooperative and worked
5 collaboratively with Wahler to try to help [the student] overcome his anxiety and
6 school avoidance. There is nothing that his parents did wrong or could have done
7 differently in this regard. It would not have been a good idea to simply drop [the
8 student] off at school and leave him. Wahler Depo. at 12, 24-27. Dr. McCall
9 agreed that [the student]'s parents were going "above and beyond" in doing
10 everything they could to help [the student] go to school. McCall at 17. She also
11 concurred that it would not have been reasonable for [the student]'s mother to
12 simply drop him off at school and leave him, because this would retraumatize him.
13 Id. at 17-18.

14 50. On November 22, 2005, the IEP team met to discuss the difficulties
15 surrounding [the student]'s anxiety as to attending school, noting that there had
16 been some informal discussions with [the student]'s mother about other options
17 such as home-based instruction or a shortened day schedule. After soliciting input
18 from [the student], the IEP team determined that [the student]'s schedule should be
19 amended so that he would attend only two classes a day at [the middle school] and
20 have two classes via "homebound" or tutored instruction. At that point, however,
21 the details regarding the tutoring still had to be worked out. Stipulated Facts at ¶
22 28; Exhibit 27.

23 51. In the interim, [the student]'s mother kept trying to get him to school.
24 Mother at 177. Both Pat Kemp and Eric Wahler had advised her to try to get [the
25 student] to school as much as possible. Mother at 189. On November 30, 2005,
26 she sent [special education teacher #1] an email expressing her excitement that
27 after some "rough going," [the student] had been able to attend art and science
28 class. She indicated that she planned to have [the student] attend art and science

1 class for the rest of the week. [Special education teacher #1] responded that this
2 was good news and that it would be an “excellent accomplishment” for [the
3 student] if he could “make it through as much as he can.” Mother at 177-78;
4 Exhibits 28, 29.

5 52. The next day, [special education teacher #1] emailed [the special
6 education administrator] asking for an update regarding the status of the
7 "homebound"/ tutoring plan. She wrote that [the student]’s mother “seems to still
8 be trying her own plan of getting [the student] ere for Art and whatever else he can
9 do. I don’t think this was the plan we had in mind when we met, but
10 whatever!!! This was the first I had heard from her since we met last week. My
11 feeling right now is that if she wants to keep trying to get him to school her way,
12 then they can let him come when he can, do homework from the homework
13 hotline, and accept the consequences (i.e. grades and missed instruction that would
14 improve his grades) without asking for extra work from the teachers. It’s this or
15 follow the exact plan as it was put together last week.” Stipulated Facts at ¶ 29;
16 Exhibit 29. Neither [special education teacher #1] nor anyone else at [the middle
17 school] ever expressed these concerns to [the student]’s mother. Mother at 180;
18 [Special education teacher #1] at 509. [Special education teacher #1] admitted that
19 [the student]’s mother was good at communicating with her and that she was
20 always able to get information from [the student]’s mother if she needed to.
21 [Special education teacher #1] at 508-09.

22 53. On December 12, [special education teacher #1] emailed [the district
23 administrator] advising that she had spoken with [the student]'s mother, who had
24 (1) indicated that [the student] was not doing well and (2) inquired as to the status
25 of the "homebound"/ tutor instruction. [The student]'s mother had also indicated
26 that he would not be back before the Christmas break, but that she wanted to get
27 him back to [the middle school] in January for Math and Comm Arts. Stipulated
28 Facts at ¶ 30; Exhibit 30.

1 54. On January 11, 2006, [the middle school] determined that [the tutor]
2 would be able to provide the after-school "homebound instruction"/tutoring to [the
3 student], which was scheduled to begin on January 17. On January 23, 2006, the
4 IEP was amended accordingly to provide that [the student] would attend two
5 classes a day and receive three hours a week of after-school tutoring at [the middle
6 school], with the intention of gradually increasing the amount of time in school.
7 Stipulated Facts at ¶ 31; Exhibits 31 & 33. From the time of the November 11,
8 2005 meeting until January 17, 2006, [the student] did not receive any tutoring or
9 homebound services. Mother at 178-81.

10 55. The amended IEP still did not meet [the student]'s needs because,
11 among other things, it failed to address [the student]'s need for coping skills in the
12 areas of social skills and study skills, reduced his exposure to learning, and reduced
13 his exposure to social interactions. Jones Depo. at 34-35. Without learning such
14 coping skills, [the student] will not be able to learn to live independently. Id. at 35.
15 [Special education teacher #1] admitted that [the student] needed to have social
16 interaction with other students to learn necessary social skills, and that being
17 isolated with a tutor did not provide him this opportunity. [Special education
18 teacher #1] at 513. What [the student] needed was an aide to be present with him
19 in the school environment to help him decipher the non-verbal cues which were
20 presented during the day, and to calm his anxiety, and provide him with verbal
21 instruction as to his assignments.

22 56. [The student]'s attendance continued to be sporadic, both for the two
23 classes and the after-school tutoring session. Stipulated Facts at ¶ 32; Exhibit 34;
24 Exhibit 56. He experienced the same anxiety about attending classes at school, and
25 although the tutoring portion of the plan worked better at first, [the student]
26 quickly developed similar anxiety regarding the tutoring sessions. Mother at 182-
27 83. His mother continued to try to get him to go every day. Id. at 183. On one
28 occasion, [the tutor] admitted that she did not know that [the student] had NLD.

1 Id. at 183-84. When [the student]’s mother explained that the visual distractions in
2 her classroom posed problems, or that taking notes was difficult for [the student],
3 she admitted that she did not know these things. Id. at 184.

4 57. Because [the student] was not receiving an education, his mother
5 again requested, as she had repeatedly in the past, that [the student] be given a list
6 of assignments so that he could at least work at home to try to keep up. Mother at
7 186, 191-92; 294-95; Stipulated Facts at ¶ 32; Exhibit 35. Not only was she
8 concerned that [the student] was falling further and further behind, she also
9 believed that if [the student] was able to achieve some success in keeping up with
10 his classes, this might help him to overcome his anxiety and motivate him to return
11 to school. Id. Since his attendance declined in sixth grade, [the student]’s mother
12 had been trying to get [the student]’s assignments so that he could keep up with his
13 work, but the school did not provide them. Mother at 188; 294-95.

14 58. On January 30, 2006, [special education teacher #1] emailed [the
15 district administrator] and [special education administrator] expressing concern
16 that [the student]’s attendance had been sporadic and describing [the student]’s
17 mother’s request. [Special education teacher #1] wrote, “the reason [the student]’s
18 mother] always gives is that they are still trying to get a medications & dosages
19 [sic] that work.” She wrote that [the middle school] had done all it should do and
20 blamed [the student]’s lack of progress on his mother:

21 Since [the student] is missing all the teacher instruction and in-class
22 activities that support learning, the only thing he can do is just read chapter
23 by chapter in the textbooks and answer the chapter review questions, etc.
24 It’s not what the teachers are doing in their classrooms, but what they are
25 doing can’t be duplicated in Homebound services. [The student] has already
26 missed so much school that he doesn’t have the skills/knowledge that he
27 should for 1/2 of 7th grade. . . . I think we need to set clear guidelines about
28 exactly what we will and will not do. Mom keeps trying to “tweak” every
plan we come up with. Will this keep going until she decides she wants the
district to pay for residential treatment? Bottom line: What exactly are we
providing and not providing? Where do we draw the line? We have bent
pretty far this year and I think we need to stop. Everything we have
suggested, planned, etc doesn’t work. Actually Mom doesn’t let it work.
We’ve gone a long way from providing a space where he can go if he’s

1 having an anxiety attack to having him not in school and wanting to do
2 everything at home. He hardly did any homework all fall during all those
3 days he “couldn’t” make it to school.
4 Stipulated Facts at ¶ 32; Exhibit 34.

5 59. [Special education teacher #1] never shared with [the student]’s
6 mother the concern that she was preventing the plans from working. [Special
7 education teacher #1] at 513. [Special education teacher #1] believed at that point
8 that the school had done everything that it knew how to do for [the student] and
9 that nothing was working. [Special education teacher #1] at 512-13.

10 60. In February 2006, [the student]’s mother called Dr. Yvonne Jones, an
11 educational consultant with expertise in NLD, seeking assistance and advice.
12 Jones Depo. at 16-17; 53; Mother at 195-96, 197-200. Dr. Jones advised [the
13 student]’s parents to continue working with the school to develop a plan for [the
14 student], and also suggested several other possible placements for [the student],
15 including Franklin Academy, a private school in Connecticut that serves NLD
16 children. Jones Depo. at 22; 25-26; Mother at 197-200.

17 61. The IEP team reconvened on February 13, 2006. As of that time, [the
18 student] had attended the classes at school on only one or two days. On some days
19 when he was able to attend the after-school tutoring, [the student] would cry,
20 would not want to work and just did not want to be in the school. Stipulated Facts
21 at ¶ 33; Exhibit 36. By this time, he was not very successful even at attending the
22 after-school tutoring. Mother at 192-93.

23 62. At the February 13 meeting, [the student]’s mother and Eric Wahler
24 explained that [the student]’s anxiety and NLD combine together to create an
25 overwhelming amount of stress for him, especially with regard to school
26 attendance and academic demands. Wahler attempted to convey to the school the
27 severity of [the student]’s anxiety and NLD and explain that this was not a case of
28 him simply being defiant or reluctant to attend school. [The student]’s mother
expressed her hope, however, that [the student]’s mental illness would eventually
respond to medication and counseling and that he would return to school on a more

1 full-time basis. She also indicated that she had been in contact with educators and
2 consultants about NLD instruction, and that the ideal setting for [the student]
3 would be small-group instruction, verbal/auditory instruction, less transitions, etc.
4 Stipulated Facts at ¶ 34; Wahler Depo. at 27-28; Exhibit 36. This is consistent
5 with the documentation of Pamela Tanguay finally presented by [the special
6 education administrator], the Special Education Administrator, to the (2006) CST.
7 Exhibit 50.

8 63. Although the 2005 CST report had stressed the importance of
9 coordinating with [the student]’s outside professionals, the February 13 meeting
10 was the first time [school psychologist #1] or [special education teacher #1] had
11 any contact with Eric Wahler regarding [the student]. [school psychologist #1] at
12 442-43; [special education teacher #1] at 483-84. Indeed, [special education
13 teacher #1] admitted that it was not until the February 13 meeting that she came to
14 a full understanding of the severity of [the student]’s problems with anxiety.
15 [Special education teacher #1] at 499. She had not had any contact with [the
16 student] during sixth grade. She had only minimal contact with him in seventh
17 grade, such as seeing him in the halls on occasion, even though she was his case
18 manager. [Special education teacher #1] at 499-500.

19 64. [The student]’s mother observed at this meeting that [the middle
20 school] staff still did not understand why [the student] was not coming to school.
21 Mother at 194. She also realized that [the middle school] staff believed that
22 everything would be fine if [the student] could just get into the school. Id. at 194.
23 She tried to explain that [the student] needed the proper setting once he was in
24 school to alleviate his anxiety and enable him to function. Id. at 194-95. She
25 explained to the team that a small classroom size was critical. Id. at 196. The
26 team discussed having [the student] in a resource math classroom, but noted that
27 “this may or may not be helpful as [the student] experiences anxiety just walking
28 in the door of such a big school.” Exhibit 36 at 2. In addition, both [the special

1 education case manager] and [special education teacher #1] had repeatedly told
2 [the student]'s mother that the students they served in their LD resource
3 classrooms had very different needs than [the student], and that it would not be a
4 good fit. Mother at 203. [The student]'s mother also suggested that the district
5 could create a structured classroom setting specifically designed to meet the needs
6 of students with NLD, but was told this would not be available. Mother at 202;
7 Exhibit 36 at 2.

8 65. There were numerous other options discussed at the February 13
9 meeting. [The student]'s mother suggested that he might do better with a 1:1 aide,
10 and other options such as the E-Net program or 1:1 instruction in a setting other
11 than [the middle school] for the remainder of the year were discussed. Stipulated
12 Facts at ¶ 35; Exhibit 36. [The student]'s mother suggested a one-on-one aide
13 because Dr. Jones had suggested this, and she thought an aide could assist [the
14 student] with study skills and organization. Mother at 201.

15 66. At the conclusion of the meeting, [the district administrator] advised
16 that he would communicate with [the elementary school] Office regarding the
17 options and the team agreed that [the student] would continue receiving services
18 from [the tutor] for the time being. Stipulated Facts at ¶ 35; Exhibit 36. On or
19 about February 22, 2006, [the special education administrator] advised [the district
20 administrator] that approval would not be given for a discrete 1:1 aide for [the
21 student], and that he ([district administrator]) would have to look to existing staff
22 within the [the middle school] building to provide those services. [The district
23 administrator] then communicated that decision to [the student]'s mother.
24 Stipulated Facts at ¶ 36; Exhibit 37. A 1:1 aide was never provided, nor did [the
25 middle school] ever commit to providing such an aide. Mother at 202; [special
26 education administrator] at 571.

27 67. On or about February 22, 2006, [the middle school] received a letter
28 from Dr. McCall dated February 15, 2006, stating that [the student] suffered from

1 panic disorder, major depression, and NLD. She wrote that [the student] was
2 unable to function in the school setting whatsoever. She indicated that she did not
3 believe that medication would be able to resolve the problem fully. She believed
4 that [the student] needed to be in a familiar and comfortable environment with
5 teaching support. If he gained confidence and familiarity with the teacher, a
6 transition back to school could be considered, although “one on one teaching
7 support will still likely be pivotal.” McCall at 21; Exhibit 11 at 24; Exhibit 37.
8 After sending this letter, Dr. McCall determined that [the student] was still not
9 making any progress in being able to function in the school setting. McCall at 21-
10 22.

11 68. Another meeting was held on March 3, 2006 to continue discussions
12 about [the student]'s situation, including possible candidates to work with him on a
13 1:1 basis. The decision was ultimately made, however, to have [the student] attend
14 the NET program at [a district elementary] School for 3 days a week, two-hours a
15 day (instead of [the middle school]) and work with [NET teacher] and the PLATO
16 software. The NET program is primarily for students who are on in-school
17 suspension, and contains up to eight students. Stipulated Facts at ¶ 37; [special
18 education administrator] at 566; Exhibit 38.

19 69. After [the student] started the NET program, he soon developed the
20 same pattern of anxiety and avoidance and his attendance was sporadic. Stipulated
21 Facts at ¶ 37; Mother at 206-07; Exhibit 38. ****, a Montana Youth Homes
22 employee who worked at NET, reported that he had seen [the student]'s mother
23 struggling to get [the student] out of the car and into the building. [special
24 education administrator] at 538-39, 570. Even when he was able to attend, he was
25 not doing his work. Mother at 207. Not only was [the student] unable to attend the
26 NET program regularly or do his work, but it was otherwise an inappropriate
27 placement for him. The idea behind this placement was simply that it would be a
28 smaller, quieter building. Mother at 207-08; [special education administrator] at

1 537. The NET program, however, is not geared toward students with disabilities
2 or NLD. Mother at 207. The setting was fairly noisy, and the police were often
3 entering the building. Id. at 208. On one occasion, [the student] was distracted by
4 other students telling stories about being in a juvenile detention center. Id. at 215-
5 16. [The Montana Youth Homes employee] had no knowledge about NLD.
6 [Special education administrator] at 569. [NET teacher], the teacher at the NET
7 program, initially was not aware that [the student] had NLD, and when she found
8 out, admitted that NET was not appropriate for him. Mother at 600-01. Moreover,
9 a computer-based program like the one at NET is not appropriate for [the student]
10 Jones Depo. at 35-36. [Special education teacher #1] admitted that the NET
11 program was “probably not the best” for [the student]. [Special education teacher
12 #1] at 514.

13 70. In March 2006, [the student]’s parents enrolled him in the Sylvan
14 Learning Center for math and writing. Mother at 209-10; Exhibit 63. He attended
15 Sylvan through August 2006, and did fairly well there, although it was not easy
16 and he still had a fair amount of anxiety. Mother at 210-11; Wahler Depo. at 25.

17 71. On March 24, 2006, [the district administrator] wrote a letter to [the
18 student]’s parents advising that he was passing only 25 percent of his classes and
19 had accumulated a total of 87 absences. The District’s standards for promotion
20 require that a student pass at least 60% of his classes and have no more than 20
21 absences. Stipulated Facts at ¶ 37; Exhibit 39; Exhibit 57 at 36.

22 72. In April 2006, [the student]’s parents took him to see Dr. Gregory
23 Burns for a neuropsychological evaluation. Mother at 213-14; Exhibit 40. Dr.
24 Burns confirmed that [the student] had NLD, along with anxiety disorder and
25 related depression. Exhibit 40 at 10-11. He noted that [the student]’s parents had
26 been exploring the possibility of a residential academic program and concluded
27 that such a program made sense for [the student] Id. at 11. [The student] needs
28 increased exposure, participation, and practice in social situations in order to

1 develop better social skills and social comprehension. Id. A residential program
2 would provide the opportunity to teach [the student] social skills and nonverbal
3 processing behaviors that he would not develop on his own, and to provide
4 ongoing support in real world situations to help him perfect these skill areas. Id.
5 Dr. Burns also recommended that [the student] continue to receive both psychiatric
6 care for his anxiety and also psychotherapy to focus on improving his ineffective
7 social behaviors, combined with the ongoing practice of appropriate social
8 behaviors. Id. at 11-12. [The student]’s parents provided the report to the District.
9 Exhibit 50 (notes of 7/26/06 meeting).

10 73. The IEP team convened on April 21, 2006 to begin developing an IEP
11 for the balance of [the student]’s 7th grade year and for his 8th grade year (2006-
12 2007). The team agreed that [the student] would complete the school year in the
13 NET / PLATO program with some modifications and accommodations, and that
14 the IEP could be amended as necessary as [the student]’s needs might change, as he
15 progressed, etc. The team observed that [the student] had difficulty entering the
16 NET classroom and his attendance was sporadic. The team also observed that [the
17 student]’s anxiety and tendency to become overwhelmed has a significant impact
18 on his educational performance. Stipulated Facts at ¶ 38; Exhibit 50 at 9.

19 74. On April 24, 2006, [the student]’s mother told Dr. McCall that she
20 had been considering other possible school settings for [the student] such as a
21 private boarding schools. [The student]’s mother was concerned that [the student]
22 would experience further failure and missed academics, which might lead to him
23 being hospitalized again. McCall at 22, 34. Dr. McCall told her it seemed like an
24 excellent idea under the circumstances. Id. at 22.

25 75. As of the conclusion of his first semester of 7th grade, [the student]
26 had a D in Life Sciences and Health/P.E., and an F in every other subject. [The
27 student] received all F’s for his third quarter grades. During his 7th grade year, [the
28 student] did not meet any of the goals or objectives in his IEP and [the middle

1 school] did not prepare any formal progress reports describing [the student]'s
2 progress toward those goals and objectives. [The student] did not meet the ****
3 School District's requirements regarding school attendance during his 7th grade
4 year and, by the end of that year, had not met the otherwise applicable
5 requirements for promotion to 8th grade. [The district administrator]
6 recommended his advancement to 8th grade, however, because he did not believe
7 that retention would not have been in [the student]'s best interests. Stipulated Facts
8 at ¶ 39; Exhibit 55.

9 76. [The student] did not receive any meaningful educational benefit from
10 the school district during his seventh-grade year. Indeed, aside from some math
11 work that [the student] had been able to do at home, [the student] received virtually
12 no education during his seventh grade year. Mother at 193. Not only was this fact
13 confirmed by Dr. Jones and Dr. McCall, (Jones Dep. at 36, McCall at 25), but
14 [special education teacher #1] admitted that [the student] did not receive an
15 education during seventh grade, ([special education teacher] at 506), and this fact
16 is virtually undisputed. Correspondingly, it was clear simply from his grades and
17 his attendance that he received no educational benefit during his seventh grade
18 year.

19 **The IEP Development Process for Eighth Grade (2006-2007)**

20 77. At the April 21st, 2006 IEP meeting, the team began discussing
21 options for having [the student] return to [the middle school] in the fall, including a
22 smaller-group and more intimate setting. There was also a discussion concerning
23 [the student]'s participation in Extended School Year [ESY] services, where he
24 could possibly serve as a "tutor" to other ESY students and continue his work on
25 math and other academics. At this meeting, [the student]'s mother requested that
26 the District consider paying the educational portion of a private boarding school
27 that caters to students with NLD. Stipulated Facts at ¶ 40; Exhibit 50 at 9-10, 12.
28 Lori Idland of the Montana Advocacy Program, on behalf of [the student]'s

1 mother, proposed creating a small classroom consisting of other students
2 throughout the district with NLD or who, like [the student], find the school
3 environment overwhelming. Mother at 221-23; [Special education administrator]
4 at 550-51. Although [the special education administrator] thought this was a good
5 idea, the school district rejected it because of its cost. Mother at 222; [special
6 education administrator] at 551, 553. By this time, from speaking to Dr. Jones, and
7 from visiting schools that educate children with NLD, [the student]'s parents had a
8 very good idea of what type of environment [the student] needed: a small campus,
9 small class sizes, not a lot of visual distractions, a calm environment, and specific
10 instruction on social pragmatics. Mother at 223.

11 78. The IEP team reconvened on April 27, 2006, and discussed
12 possibilities including smaller resource classes at [the middle school], but there
13 were uncertainties regarding what type of classes would be offered the next year.
14 The team also discussed how to help [the student] feel more comfortable about
15 entering the [the middle school] building, and the ESY program. Stipulated Facts
16 at ¶ 41; Exhibit 50 at 11-12. [The special education administrator] advised [the
17 student]'s mother that he had discussed her request concerning a private boarding
18 school with his administrators and that the District would not pay for it because
19 there was no funding support available for such a request. [The student]'s mother
20 told the team that she was working with Dr. Jones, and Ms. Idland requested that
21 the District consult with Dr. Jones to obtain expert advice on what [the student]
22 needed. The District, however, did not contact Dr. Jones, nor did it consult with
23 any other expert. Stipulated Facts at ¶ 42; [special education administrator] at 552,
24 567-68; Exhibit 50 at 11-12.

25 79. The IEP team reconvened on May 24, 2006, with [the student]'s
26 proposed case manager for 8th grade [special education teacher #2] present. The
27 team agreed that [the student] would benefit from as much small-group instruction
28 as possible, with special education services in the areas of math, written language,

1 study skills, and social behavioral skills. The math and written language services
2 would be received in the smaller special education setting, and the hours/setting for
3 the study skills and social behavioral components would be determined once the
4 schedule of classes was set for [the middle school] in June. Stipulated Facts at ¶
5 43; Exhibit 50 at 13.

6 80. The IEP team also noted that [special education teacher #2] and ****
7 (the ESY instructor) would be available during the summer through the ESY
8 program to develop a relationship with [the student] in hopes that it would help
9 him in re-entering [the middle school] in the fall. The IEP did not address what
10 would be done if [the student]'s anxiety prevented him from accessing the school in
11 the fall. Stipulated Facts at ¶ 44; Exhibit 50 at 14. [The middle school] staff told
12 [the student]'s parents that the school was not responsible for getting [the student]
13 into the building, and that the school's responsibility began only once [the student]
14 entered the building. Mother at 225; Exhibit 50 at 13. Of course, once he entered
15 the building no aide would be provided.

16 81. At the time of the May 24 meeting, [the student] had not been
17 attending the NET program. His mother explained that he was refusing to enter the
18 building at NET. She noted that [the student] had been able to attend one day at
19 [the middle school] but not thereafter. She stated that she wanted the [the middle
20 school] setting to work for [the student] next fall but was concerned that it would
21 not, and wanted to discuss what other alternatives could be provided. Exhibit 50 at
22 13-14.

23 82. Following the May 24 meeting, the school prepared a draft IEP
24 proposing that [the student] would attend [the middle school] and would be in a
25 resource classroom for math and written language, and in the regular education
26 setting for the rest of the day, with similar accommodations to those in prior IEPs.
27 Exhibit 41. Penciled on the IEP was an indication that [the student] might receive
28 some services in the areas of study skills and social/behavioral, but there was no

1 firm agreement as to how much time would be devoted to this or what type of
2 services he would receive. Mother at 227; [special education teacher #1] at 493-
3 94; Exhibit 41 at 3. The positive behavior support plan was left blank, with the
4 idea that it would be drafted in the fall. Mother at 232; Exhibit 41.

5 83. [The student]'s mother did not believe the IEP was adequate. Mother
6 at 227. She was concerned that [the student] was still in large regular education
7 classes for all but two of his classes. Id. at 228. As for the resource room classes,
8 she agreed that a smaller class size was important but was concerned because
9 school staff for the last two years had told her that the resource classes for LD
10 students were not appropriate for [the student]. Id. at 228. In addition, she was
11 concerned that there was no specific proposal as to how to provide services in the
12 areas of study skills and social/behavioral. Id. at 228-29. [The student]'s parents
13 did not sign the IEP.

14 84. On June 8, 2006, [the student]'s mother and Lori Idland met with
15 [special education administrator] and Assistant Superintendent **** to express and
16 discuss concerns regarding the adequacy of the proposed IEP. Stipulated Facts at ¶
17 45; Exhibit 50 attachment to IEP minutes dated 6/8/06. [The student]'s mother
18 stated her concerns: [the student]'s teachers would not be knowledgeable about
19 NLD and [the student]'s unique needs; [the student] needed specific and repeated
20 coaching in the areas of nonverbal processing and social pragmatics so that he can
21 develop necessary coping skills; he would not likely be able to function in the
22 larger regular education classrooms – he needs a smaller learning environment the
23 entire day; and, the proposed IEP did not address what the school would do if [the
24 student]'s anxiety prevented him from attending [the middle school], as it had for
25 the past year, and the school would not commit to any alternatives. Mother at 233-
26 36; Exhibit 50.

27 85. At the June 8 meeting, various possibilities were discussed, but the
28 District did not commit to any specific placement. Instead, the District agreed to

1 consult with the principal and hold another meeting on June 26. Mother at 236;
2 Exhibit 50. [The student]'s mother informed the District at the June 8 meeting that
3 she planned to send [the student] to a two-week-long summer program at Franklin
4 Academy in July. Mother at 236-37; Exhibit 50.

5 86. On June 12, 2006, [the student]'s parents provided written notice to
6 the School District that they intended to enroll [the student] in Franklin Academy,
7 a private boarding school in East Haddam, Connecticut that specializes in students
8 with NLD. [The student]'s parents indicated, however, that they were still willing
9 to discuss any further proposals from [the middle school]. Stipulated Facts at ¶ 45;
10 Exhibits 45 & 46. By this time, [the student]'s parents had applied to and paid a
11 deposit to Franklin in order to hold a space for him, but were still hoping that
12 something might be worked out so that [the student] could stay in [the city].
13 Mother at 237-39.

14 87. [The student] went to the two-week summer program at Franklin in
15 July and although he was quite anxious, he was able to attend the entire program.
16 Mother at 239-40.

17 88. On July 13, 2006, Lori Idland sent a letter to [the special education
18 administrator] noting that she had called [the special education administrator's]
19 office on June 26 to determine the status of the school's proposed placement, and
20 had been told the District was still working on a response. As of July 13, neither
21 Ms. Idland nor [the student]'s parents had received a response. The District was
22 not able to meet on the 18th or 19th of July, as proposed by Ms. Idland, but a
23 meeting was set for July 26, 2006. Exhibit 49.

24 89. The IEP team convened again on July 26, about a month before the
25 start of the school year, and proposed an IEP that involved the following schedule:

26 1st Period: Beginning the day in [special education teacher #2's] resource
27 reading room, but working independently with a para-professional on an
28 individualized curriculum (i.e., PLATO), while [special education teacher
#2] taught class to other students.

2nd: Social Studies in a regular education class (Mr.****), right next door

1 to [special education teacher #2]; this class would have had approximately
2 20 to 23 students

3 3rd: Resource English with [special education teacher #2]; The writing
4 component of this class is taught anywhere from a fourth to sixth grade
5 level, and would have had eight students (including [the student]); most of
6 the students in this class have learning disabilities that impair their ability to
7 perform in English.

8 4th: This was to-be-determined, but one idea was to have [the student] serve
9 as an office helper where he would interact socially with various adults and
10 students.

11 Lunch: Lunch with entire group, which would have consisted of
12 approximately 300 other 8th and 7th graders.

13 5th: Resource Math with [special education teacher #2], along with eight
14 other students; most of the students in this class have learning disabilities
15 that impair their ability to do math and have gaps at the 5th and 6th grade
16 level; the goal of the class is to get the students ready for pre-algebra. The
17 class works at about a sixth grade level.

18 6th: Resource Science with [special education teacher #2], along with ten
19 other students, only four of whom would been in either [the student]'s Math
20 or English class; most of these students have learning disabilities and,
21 although the textbook is at a 6th or 7th grade level, the course is taught in a
22 more elementary fashion intended to assist the students, most of whom have
23 not had 6th or 7th grade science.

24 Stipulated Facts at ¶ 46; [Special education teacher #2] at 578-83; Exhibit 50,
25 7/26/06 notes, at 2.

26 90. The IEP also proposed that [the student] would receive extended
27 school year (“ESY”) services. The proposal was that [special education teacher
28 #2] would meet with [the student] for about a week prior to the start of school, to
try to develop a rapport and familiarize [the student] with the school routine.
Mother at 242; Exhibit 50 (notes of 7/26/06 meeting). In addition, [the student]
would receive ESY services from [the ESY instructor] , an ESY instructor with no
knowledge of NLD and no experience with children with NLD. [Special education
administrator] at 548-49, 569.

91. The IEP also contemplated [the student] starting the school day fifteen

1 minutes later, and ending it fifteen minutes early to avoid the crowded halls. Ideas
2 for a Positive Behavior Support Plan were discussed, such as offering [the student]
3 a quiet place where he could calm down, encouraging him to do deep breathing
4 exercises, etc., but no firm plan was developed. The idea was that the specifics
5 would be firmed up after [special education teacher #2] and [the student] had
6 established a rapport. Stipulated Facts at ¶ 47; Exhibit 50 at 6A.

7 92. There was no specific plan to provide services directed at the
8 Social/Behavioral area outside of the schedule outlined above and the general
9 education accommodations. Stipulated Facts at ¶ 47. The component of the IEP
10 that was supposed to provide these services was the “to be developed” portion of
11 the schedule when [the student] was to work as an office aide or in the library.
12 [Special education teacher #2] at 581-82.

13 93. The IEP did not have a specific plan for what services would be
14 provided if [the student] was unable to enter and attend classes at [the middle
15 school]. The IEP simply listed several suggestions for possible alternative
16 placements such as NET, homebound services at the County Library, contract
17 services with Sylvan, or homebound services through the ***** District. As for
18 Sylvan, the District indicated that it might be willing to contract for one hour a day,
19 and [the student]’s mother responded that this would not be sufficient to meet [the
20 student]’s needs. Stipulated Facts at ¶ 48; Mother at 243-44; Exhibit 50, 7/26/06
21 notes at 3-4. [The student]’s mother requested that the school commit to an
22 alternative plan, but the District refused to commit to providing any of these
23 alternatives, agreeing only that they would meet again and explore possible
24 alternatives if the need arose. Mother at 243-44; [school psychologist #1] at 462-
25 63; ***** at 560-62. The district did not even provide a clear timeline for
26 identifying and implementing an alternative plan. [Special education
27 administrator] at 562-63. Moreover, homebound instruction or Sylvan Academy
28 would not have been appropriate for [the student] because they would be socially

1 isolating and do not address his need to learn compensatory strategies. Jones
2 Depo. at 39-40.

3 94. [The student]'s parents refused to sign the IEP. Mother at 145. [The
4 student]'s mother spoke with Dr. McCall on July 31, 2006, who advised her that
5 [the student]'s likelihood of success at [the middle school] was minimal, and the
6 proposed IEP was a "setup" for further failure. McCall at 22-24. Dr. McCall was
7 concerned that [the student] would feel like a total failure, lose hope, and become
8 suicidal. Id. at 24; Mother at 247-48. [The student]'s parents shared Dr. McCall's
9 concern that the IEP would not be successful because of [the student]'s issues with
10 anxiety and avoidance. Mother at 245-51. They were also concerned that the IEP
11 did not contain the services in the social skills area in order to teach [the student]
12 the coping skills he needed. Id. at 246-47. In addition, no one at the school had
13 suggested that [special education teacher #2] would be able to take time out from
14 teaching class and give [the student] individualized attention whenever he was
15 having a panic attack or experiencing anxiety. Id. at 249.

16 95. Both Eric Wahler and Dr. McCall testified that based on [the
17 student]'s long and entrenched history of anxiety and school avoidance, it is not
18 likely that he could have attended [the middle school] on a regular basis under the
19 proposed IEP. Wahler Depo. at 31-35; McCall 23-24, 27-28, 37. Wahler
20 acknowledged that the IEP contained some changes from prior IEPs that might
21 have been helpful for most children, or that might have helped [the student] if they
22 had been provided at the beginning of seventh grade. But [the student]'s disorder
23 was so severe, and his aversion to the school had grown so great by the end of
24 seventh grade, that these changes would not have been enough to enable him to
25 attend [the middle school]. Wahler Depo. at 31-35. Dr. McCall noted that [the
26 student] had been working with therapists and other professionals for a long time
27 without success, and did not believe [the middle school] staff would have any more
28 luck in only one month's time. McCall at 28. Wahler explained that for some

1 children, developing a relationship with an adult could have helped, but that [the
2 student]'s problems by the end of seventh grade were much more severe than that.
3 Wahler Depo. at 21. Both Eric Wahler and Dr. McCall testified that, not only
4 would [the student] likely not succeed under the proposed IEP, but that further
5 failure would have put him at risk for suicide. Wahler Depo. at 31-35; McCall 23-
6 24, 27-28, 37. Dr. McCall testified that sending [the student] to Franklin was
7 necessary. McCall at 30.

8 96. This Hearing Officer finds the testimony of these witnesses, who had
9 extensive knowledge of [the student] and his anxiety issues, to be credible and
10 persuasive. Indeed, [special education teacher #1] admitted that she did not know
11 whether [the student] would be able to overcome his anxiety and attend [the middle
12 school] in eighth grade. [Special Education teacher #1] at 516. [The special
13 education administrator] agreed that it was reasonable, based on [the student]'s
14 history, for [the student]'s parents to be concerned that his anxiety and school
15 avoidance would persist into eighth grade. [Special Education Administrator] at
16 573. The only evidence to contradict the expert testimony of Dr. McCall and Eric
17 Wahler was that of [school psychologist #1], who testified that she believed the
18 IEP would have been successful, based on her knowledge of [special education
19 teacher #2] and [ESY instructor]. [School psychologist #1] at 456. She admitted,
20 however, that she never provided any counseling services to [the student], and the
21 only direct contact she had with him was during the reevaluation process in March
22 2005. Id. at 457. She had not had any conversations of substance with Pat Kemp
23 or Eric Wahler concerning [the student]'s condition, and neither she nor anyone
24 else at [the middle school] had contacted Dr. McCall. [School psychologist #1] at
25 443; McCall at 19. Clearly, Dr. McCall and Eric Wahler were in a better position
26 to assess [the student]'s condition.

27 97. Even if [the student] had been able to overcome his anxiety
28 sufficiently to attend [the middle school] on a regular basis, the proposed IEP

1 would not have provided him an educational benefit and was not tailored to his
2 unique needs. It appears that [the student] is capable of completing school, living
3 independently, and having a job. For [the student] to succeed, it is essential that he
4 be provided a suitable environment and assistance in developing coping skills.
5 Wahler Depo. at 29-30; Jones Depo. at 20-21. Eric Wahler explained that [the
6 student] needs constant monitoring and reassurance for his anxiety by staff who are
7 well-trained in NLD and panic disorder. He also needs frequent, immediate, and
8 proactive interventions designed to improve his peer interactions. Without
9 improving his social skills, it is not likely that [the student] will be able to succeed.
10 Wahler Depo. at 29-30. For children with NLD, it is critical that they receive
11 guidance immediately when a problem arises. Hays at 362-63. This is consistent
12 with the documentation of Pamela Tanguay finally presented by [special education
13 administrator], the Special Education Administrator, to the (2006) CST Exhibit 50.
14 Similarly, Dr. Jones testified that [the student] needs direct instruction in
15 developing social, pragmatic, and coping skills which are consistently reinforced in
16 the classroom. Jones Depo. at 22-24. It is crucial that his teachers be
17 knowledgeable about his disability. Id. at 24-25. In addition to small class sizes,
18 he also needs a highly predictable environment with a small overall school size and
19 a simple physical setting. Id. at 22-23, 66-67. The proposed IEP did not provide
20 [the student] the services and environment he needs.

21 98. In addition, his proposed class schedule was not appropriate for [the
22 student] and was not tailored to meet his unique needs. [The student]'s case
23 managers and others had previously told [the student]'s mother repeatedly that LD
24 resource classrooms were not appropriate for [the student] because he did not fit
25 the LD profile. Mother at 161-63; 203, 228, 248-249. Dr. Hays confirmed that
26 because the learning styles of NLD children are essentially the opposite of those of
27 most LD children, the type of classroom instruction that is effective for children
28 with learning disabilities is inappropriate for NLD children. Hays at 345-46, 385-

1 86. It is typically a “disaster” to place an NLD child in a resource classroom.
2 Hays at 370-71. Moreover, the resource classes were not at an appropriate level
3 for [the student]. He is functioning at about a ninth grade level academically, and
4 it would obviously not be appropriate to put [the student] in a class at a fourth to
5 sixth grade level. Corcoran at 411-12. If he were placed in such a class, he would
6 likely become bored, distracted, and anxious, and his pattern of withdrawing would
7 repeat itself. Id.; Hays at 385. The reason [the student] was placed in these
8 resource classrooms was simply that the school knew he needed a smaller class
9 size, and these classes were what was available. [Special Education administrator]
10 at 543.

11 99. Even if the classes proposed in the IEP were at an appropriate
12 academic level, they were still too large. His regular education class had over
13 twenty students, and even the resource room classes had up to eleven students. Dr.
14 Jones testified that a class as large as 10 to 15 students would be “pushing it” for
15 [the student], and that he might struggle in even a smaller class size. Jones Depo.
16 at 66, 76. Bridget Corcoran, who was probably most familiar with [the student]’s
17 academic functioning, testified that the ideal class size for [the student] would be
18 three students total. Corcoran at 408-09. If [the student] were placed in a class
19 larger than six students for his core classes, he would struggle with staying
20 focused. Id. at 409. Of course, this discussion may have been totally unnecessary
21 if [the middle school] would have provided [the student] with an aide.

22 100. On August 17, 2006, [the student]’s parents provided written notice
23 that they did not accept the IEP, and that they planned to enroll [the student] at
24 Franklin Academy. The School District responded that it did not consent to the
25 placement. Stipulated Facts at ¶ 49; Exhibits 52 & 53.

26 **Franklin Academy (Eighth Grade 2006-2007)**

27 101. [The student] started eighth grade at Franklin Academy in September
28 of 2006 and has been attending Franklin since that time. Stipulated Facts at ¶ 50.

1 102. Franklin is a small school with only about 75 students, from eighth
2 grade up through high school. Hays at 329-30.

3 103. Franklin is a boarding school, and its residential component is
4 specifically designed to help children with NLD. These children need to learn
5 coping skills in various areas of life, not just academics, including life skills, social
6 skills, managing their anxiety, working on organizational skills, and learning
7 compensatory strategies for visual-spatial and processing speed deficits. Hays at
8 346-47.

9 104. The District does not contest that Franklin was an appropriate
10 placement. District's Reply Memorandum at page 12.

11 105. Since [the student] began attending Franklin, his parents have
12 observed that his self esteem has improved, and he has matured. Mother at 254.
13 Dr. McCall observed that [the student]'s depression has been in partial remission
14 since the end of July 2006. McCall at 11-12. He now seems more upbeat and
15 confident, and less anxious. Id. at 20. She believes that [the student]'s success at
16 Franklin helped him to address his anxiety and to be more comfortable with
17 himself. Id. at 20-21. [The student] talked about Franklin with Dr. McCall, and
18 although he was anxious about being away from home, he was very motivated and
19 wanted to be successful. Id. at 24-25.

20 106. This Hearing Officer concludes that Franklin is an appropriate
21 placement for [the student]. He clearly shares the common learning, social, and
22 emotional characteristics of the NLD children that Franklin is uniquely tailored to
23 serve. Hays at 374; Jones Depo. at 26-27. Dr. Hays testified that Franklin is "built
24 for a kid like [the student]." Id. at 374, 386. [The student] is receiving appropriate
25 instruction and services and is able to function in school in a way that he had not
26 been able at [the middle school].

27 107. Franklin Academy charged [the student]'s parents \$61,800 in tuition
28 and fees for the 2006-2007 school year, which has been paid-in-full. Stipulated

1 Facts at ¶ 50; Exhibit 59.

2 108. In addition, [the student]'s parents have spent \$9,352.90 on airfare,
3 and related charges, for travel to and from Connecticut, as a result of [the
4 student]'s placement. Stipulated Facts at ¶ 51; Exhibit 60; Mother at 255-56.

5 109. On the two occasions in September and October of 2006, when one or
6 both of [the student]'s parents traveled to Franklin Academy, they spent \$766.90 in
7 lodging and rental car expenses. Stipulated Facts at ¶ 52; Exhibit 61.

8 110. Franklin Academy requires that each student have an Apple laptop
9 computer. [The student]'s parents spent \$2,475.95 to purchase a laptop for [the
10 student]. Stipulated Facts at ¶ 53; Exhibit 62.

11 111. [The student]'s parents paid \$3,640 to Sylvan Learning Center, in [the
12 city], for [the student] to attend math and writing classes from March 2006 through
13 August 2006. Stipulated Facts at ¶ 54; Exhibit 63.

14 112. [The student]'s parents paid \$2,689.50, for the consulting services of
15 Dr. Yvonne Jones from February 2006, through August of 2006. Stipulated Facts
16 at ¶ 55; Jones Depo. at 40-41; Exhibit 64.

17 113. [The student]'s parents paid \$435 out-of-pocket, beyond what was
18 covered by insurance, to mental health counselor Eric Wahler for mental health
19 counseling services for [the student] from September 2005, through April 2006.
20 Stipulated Facts at ¶ 56; Eric Wahler Depo. at 36-37; Exhibit 65

21 114. [The student]'s parents paid \$345 out-of-pocket, beyond what was
22 covered by insurance, to mental health counselor Pat Kemp for mental health
23 counseling services for [the student] from October 2004, through September 2005.
24 Stipulated Facts at ¶ 57; Joint Exhibit 66.

25 From the foregoing Findings of Fact, the Hearing Officer makes the
26 following:

27 **CONCLUSIONS OF LAW**

28 1. Since the enactment of the Education for All Handicapped Children

1 Act of 1975, Congress has amended the Act and renamed it the Individuals with
2 Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* The primary
3 purpose of the IDEA is:

4 to ensure that all children with disabilities have available to them a free
5 appropriate public education which emphasizes special education and related
6 services designed to meet their unique needs and prepare them for further
education, employment, and independent living; . . .

7 20 U.S.C. § 1400(d)(1)(A) (2004).²

8 2. [The student] is, and has been at all relevant times herein, qualified to
9 receive instruction and related services pursuant to the requirements of the IDEA.
10 20 U.S.C. §§ 1400 *et seq.*

11 3. The requirements of the 1997 IDEA apply to disputes regarding the
12 appropriateness of [the student]’s education prior to July 1, 2005, whereas the
13 IDEA, as amended in 2004, applies to disputes regarding [the student]’s education
14 after July 1, 2005 (the effective date of IDEA 2004).

15 4. The IDEA has been implemented on the federal level by the adoption
16 of regulations found at 34 C.F.R. Part 300. The federal regulations adopted in
17 1999 to implement IDEA 1997, clearly apply before the effective date of IDEA
18 2004, or July 1, 2005. After July 1, 2005, the statutory language of IDEA 2004 is
19 controlling; the 1999 federal regulations that do not conflict with IDEA 2004,
20 apply as well. Federal regulations implementing IDEA 2004, though not effective
21 until October 13, 2006, provide guidance as to the Department of Education’s
22 interpretation of IDEA 2004, for the time-period after the effective date of the
23 2004 IDEA and may be cited to herein for that purpose.

24 5. The State of Montana has chosen to participate in federal funding
25 available under the IDEA. State law guarantees: "A child with a disability in
26

27 ² (The 1997 version of the IDEA states the same purpose, with the exception that
28 the term “further education” was added in 2004.)

1 Montana is entitled to a free appropriate public education provided in the least
2 restrictive environment." Section 20-7-411 (1), MCA 2005. The State of Montana
3 has promulgated regulations implementing the state law. *See* Title 10, Chapter 16,
4 Administrative Rules of Montana.

5 6. The IDEA mandates: "A free appropriate public education is available
6 to all children with disabilities residing in the State between the ages of 3 and 21,
7 inclusive" 20 U.S.C. § 1412(a)(1)(A) (1997, 2004). A FAPE is defined by the
8 IDEA as:

9 special education and related services that (A) have been provided at public
10 expense, under public supervision and direction, and without charge; (B)
11 meet the standards of the State educational agency; (C) include an
12 appropriate preschool, elementary, or secondary education in the State
involved; and (D) are provided in conformity with the individualized
education program required under section [20 U.S.C. § 1313(d)].

13 20 U.S.C. § 1401(8) (1997); 20 U.S.C. § 1401(9) (2004).

14 7. For purposes of the IDEA, "special education" means "specially
15 designed instruction, at no cost to parents, to meet the unique needs of a child with
16 a disability," and includes, "instruction conducted in the classroom, in the home, in
17 hospitals and institutions, and in other settings." 20 U.S.C. § 1401(25) (1997); 20
18 U.S.C. § 1401(29) (2004). Thus, a FAPE must be "tailored to the unique needs of
19 the handicapped child." *Board of Education v. Rowley*, 458 U.S. 176, 181 (1982).

20 8. "Related services" are defined to include, *inter alia*, developmental,
21 corrective, and other supportive services including speech-language pathology,
22 psychological services, occupational therapy, and counseling services, "as may be
23 required to assist a child with a disability to benefit from special education." 20
24 U.S.C. § 1401(22) (1997); 20 U.S.C. § 1401(26) (2004).

25 9. The IEP is the means by which the FAPE required by the IDEA is
26 tailored to the unique needs of the student – it is the *modus operandi* of the IDEA.
27 *Town of Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 368 (1985).
28 Federal law requires that the District provide the services listed in a child's IEP.

1 10. This Hearing Officer's inquiry in determining whether [the student]
2 received a free appropriate public education is twofold. First, it must be
3 determined whether the school district complied with the procedures set forth in
4 the IDEA³ for the development of the Individualized Education Program (IEP).
5 Second, it must be determined whether the IEP is reasonably calculated to enable
6 the child to receive meaningful educational benefit. *Rowley*, 458 U.S. at 206-07;
7 *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001).

8 **I. THE DISTRICT'S FAILURES TO COMPLY WITH THE IDEA'S**
9 **PROCEDURAL REQUIREMENTS DENIED FAPE.**

10 11. During [the student]'s sixth and seventh grade years at [the middle
11 school], the District committed numerous procedural violations. The District
12 violated the IDEA's procedural requirements by: (1) failing to review and revise
13 [the student]'s IEPs as necessary in a timely manner; (2) failing to consider the
14 results of [the student]'s evaluations in formulating the IEPs; (3) failing to ensure
15 meaningful participation on the part of [the student]'s parents; (4) failing to
16 provide regular progress reports; and (5) failing to provide written notice regarding
17 the denial of a change in placement, or the provision of a FAPE. When a school
18 district's procedural failures result in the loss of educational opportunity or infringe
19 the parents' opportunity to participate meaningfully in the IEP process, this results
20 in a denial of FAPE. *See W.G. v. Board of Trustees of Target Range*, 960 F.2d
21 1479, 1485 (9th Cir. 1992). In this case, the numerous and repeated procedural
22 violations directly resulted in the denial of a FAPE.

23 12. First, the District repeatedly failed to review and revise [the student]'s
24 IEPs as necessary in a timely manner. The IDEA requires that the IEP team revise
25 the IEP, as appropriate to address the child's lack of progress, the child's
26 anticipated needs, information provided by the parents, or other matters. 20 U.S.C.
27 § 1414(d)(4)(A) (1997, 2004). At a bare minimum, the IEP must be reviewed
28

³ 20 U.S.C. §§ 1400 *et seq.* (1997, 2004)

1 annually. *Id.*

2 13. In sixth grade, [the student]’s attendance and performance plummeted
3 dramatically in January 2005 as a result of his disability, and the District was well
4 aware of the problem. Even before that, however, the District should have been
5 aware that there were problems. For example, as early as November 4, 2004, when
6 [the speech-pathologist] prepared [the student]’s progress report, it was clear that
7 he was not meeting any of his goals in the area of language/communication. This
8 was a marked departure from previous progress reports. As for his study skills,
9 one of [the student]’s IEP goals was to maintain a B average each quarter. Indeed,
10 [elementary school teacher] his teacher at [the elementary school], had indicated
11 that if he did not earn As and Bs, this was a sign that something was wrong. Yet
12 during the second quarter of his first semester, [the student] received a C in both
13 Math and Comm Arts. Exhibit 55 at 10.

14 14. For these reasons, it should have been clear, at least by January 2005,
15 that [the student]’s IEP needed to be revised. The District convened an IEP
16 meeting on February 11, 2005, and devised the plan to allow [the student] to have a
17 cell phone and “safe zones,” yet made no mention of [the student]’s failures to
18 meet his IEP goals, and specifically declined to make any determination as to
19 whether he needed additional support. Exhibit 9. It was not until April 27, 2005,
20 that an IEP meeting was held and a new IEP developed, more than one year after
21 his previous IEP (March 26, 2004) and many months after it was clear that the
22 prior IEP was not working; [the student] was not meeting his goals; and, he had
23 substantial needs which were not being met. In the meantime, not only was [the
24 student] not receiving an education, but his lack of success in attending school had
25 caused him to become suicidal. [The student]’s parents repeatedly requested that
26 the District make someone available on a regular basis to counsel [the student]
27 when he needed help, and to help him enter the building in the morning. Had the
28

1 District amended the IEP in a timely manner to address those needs, [the student]'s
2 downward spiral might have been averted.

3 15. The pattern of failing to review and revise IEPs to meet [the student]'s
4 needs in a timely manner continued in the seventh grade. It was obvious since at
5 least October 2005, that [the student]'s IEP was not meeting his needs. Not only
6 was he failing to meet any of his IEP goals, he was not even able to attend school.
7 A student who should have been earning As and Bs was failing miserably. Yet it
8 was not until January 2006 that the IEP was revised to provide for after-school
9 tutoring. In the meantime, [the student] was subjected to an entire semester of
10 failure and lost educational opportunity. It quickly became clear that the amended
11 IEP was not providing [the student] with a meaningful educational benefit. Yet it
12 was not until two months later that the decision was made to place [the student] in
13 the NET program. Again, it quickly became clear that the NET program was not
14 successful. Yet when the IEP team met again in April, instead of revising the IEP,
15 it decided that NET would remain [the student]'s placement for the remainder of
16 the year. The result was yet another semester of failure and lost educational
17 opportunity. Remarkably, The District failed to even amend the IEP to provide
18 that [the student] would be given assignments to take home, despite his mother's
19 repeated requests.

20 16. Second, the District violated the IDEA by failing to consider the
21 results of [the student]'s evaluations in developing his IEPs. The IDEA requires
22 that, in developing or revising an IEP, the District must consider the results of the
23 initial or most recent evaluation of the child. 20 U.S.C. § 1414(d)(3) (1997, 2004).
24 In this case, the District failed to do so. In preparing [the student]'s April 2005
25 IEP, the District failed to consider the results of the CST report prepared the month
26 before. For example, the 2005 CST report recognized that [the student] had a high
27 level of social maladjustment, and recommended that [the student] receive services
28 in the areas of social skills, observing that [the student] struggled to pick up on

1 social skills, and his therapist advised that [the student] needed to be taught “social
2 stories.” Exhibit 11 at 12, 14-15, 22. Yet no such services were included in the
3 IEP. The CST report also noted it was necessary for school staff to collaborate
4 with outside professionals to develop strategies for decreasing [the student]’s
5 anxiety, to improve his attendance. Exhibit 11 at 1. During [the student]’s entire
6 seventh grade year, there was virtually no such collaboration. Eric Wahler
7 attended one IEP meeting in February 2006, but was otherwise not consulted by
8 the District, even though there were several IEP meetings that year. Similarly, the
9 District never contacted Dr. McCall. [The student]’s parents specifically requested
10 that the District contact Dr. Jones, another outside professional, in developing the
11 2006 IEP. The District failed to do so. *See also Target Range School. Dist.*, 960
12 F.2d 1479, at 1484 (school district violated IDEA by failing to consider the
13 recommendations of knowledgeable persons). Indeed, during the entire process of
14 developing the proposed IEP, the District did not consult with any of [the
15 student]’s treating professionals or any other expert. The 2005 CST report also
16 emphasized, “Most importantly, [the student]’s educational program should stress
17 compensatory strategies which will assist his future academic progress by
18 enlarging his repertoire of coping mechanisms.” Exhibit 11 at 22. Yet his IEPs
19 contained nothing directed at teaching [the student] necessary coping mechanisms.
20 These failures resulted in the loss of educational opportunity. The District’s failure
21 to consider adequately its evaluations in developing and implementing his IEPs,
22 led directly to its failure to provide [the student] with a FAPE.

23 17. Third, [the student]’s parents were denied meaningful participation in
24 the IEP process. One of the primary goals of the IDEA’s procedural requirements
25 is to ensure parental participation. The United States Supreme Court has
26 recognized the “necessity of parental participation in both the development of the
27 IEP and any subsequent assessments of its effectiveness.” *Honig v. Doe*, 484 U.S.
28 305, 311 (1988). It is not enough simply to ensure that parents are present at IEP

1 meetings. Instead, the IDEA “imposes upon the school district the duty to conduct
2 a meaningful meeting with the appropriate parties.” *Target Range School Dist.*,
3 960 F.2d at 1485. One of the most significant decisions made at the April 2005
4 IEP meeting, was the decision to discontinue social skills and communication
5 services—even though [the student] was failing to meet any of his goals or
6 objectives in those areas. Yet, [the student]’s parents were denied any meaningful
7 participation in this decision. [The student]’s mother explained that this issue was
8 brought up only as the speech therapist was leaving the meeting early, and
9 mentioned on her way out that she did not believe [the student] needed to receive
10 further services. Mother at 599-600. There was no opportunity for consultation.
11 *Id.* The result was that [the student]’s parents were denied meaningful
12 participation in a decision that was critical to [the student]’s education. Similarly,
13 during seventh grade, [special education teacher #1] believed that it was [the
14 student]’s parents, rather than his disability itself, that were preventing the IEP
15 from being successful. Yet neither she nor anyone else raised this concern with
16 [the student]’s parents. Had she done so, she would likely have realized her
17 fundamental misunderstanding of the nature and severity of [the student]’s
18 disability. [The special education administrator] admitted that there was
19 “miscommunication” between the parties. [Special education administrator] at
20 572. This miscommunication could have been avoided had the District shared with
21 [the student]’s parents its concerns and provided them a meaningful opportunity to
22 discuss these issues.

23 18. Fourth, the District also violated the IDEA by failing to prepare
24 regular progress reports. The IDEA requires that parents be provided reports
25 describing the child’s progress toward the annual goals contained in the IEP. *See*
26 20 U.S.C. § 1414(d)(1)(A)(viii) (1997); 20 U.S.C. § 1414(d)(1)(A)(i)(III) (2004).
27 In sixth grade, the District prepared only one report on [the student]’s study skills
28 at the end of the school year indicating that [the student] was not meeting his goals.

1 As already noted, [the student] was failing to meet at least one significant objective
2 (maintaining a B average) during the first semester. During the first semester, [the
3 student]'s mother could tell that [the student] was struggling, and it is likely that he
4 was failing to meet other objectives as well (writing down his assignments each
5 day and staying on task). Had the District prepared timely progress reports as it
6 was required to do, it is likely that the school would have become aware of some of
7 [the student]'s problems at a much earlier date, and been in a better position to
8 appropriately revise the IEP in a timely manner. The result was that [the student]
9 was deprived of educational opportunity, and his needs went unmet. Similarly, in
10 seventh grade, the District failed to prepare any progress reports whatsoever.

11 19. Finally, the IDEA requires that the District provide written notice
12 whenever it refuses to change a child's educational placement or the provision of a
13 FAPE. 20 U.S.C. § 1415(b)(3) (1997, 2004); 34 C.F.R. § 300.503 (1999, 2006).
14 The notice must include a description of the action refused by the District; an
15 explanation of why the District refuses to take the action; a description of other
16 options considered, and an explanation as to why they were rejected; a description
17 of each evaluation procedure, test, record, or report the agency used as a basis for
18 the refused action; a description of other factors relevant to the District's refusal; a
19 statement regarding the parents' procedural rights; and, sources for parents to
20 contact to obtain assistance. 34 C.F.R. § 300.503 (1999, 2006).

21 20. As [the student]'s school performance deteriorated, [the student]'s
22 parents made repeated requests for changes in [the student]'s placement, or the
23 provision of a FAPE which the District rejected. For example, [the student]'s
24 mother repeatedly asked that someone be consistently available to meet [the
25 student] in the morning to help him access the building, and for an adult to be
26 consistently available during the day, if [the student] needed assistance. This was a
27 matter of extreme importance and could have changed the trajectory of [the
28 student]'s downward spiral at [the middle school]. Yet the District never provided

any written notice explaining why it refused the requests, or containing any of the requirements of the rule.

21. Similarly, [the student]'s mother made repeated requests that [the student] be placed in a smaller class size, which the District rejected until the spring of 2006 when it finally proposed some smaller classes. [The student]'s mother requested that the District put together a special class to serve [the student] and other children like him. She requested a one-on-one aide. She repeatedly requested that [the student] be provided assignments he could work on at home. The District denied all these requests without providing written explanations complying with § 300.503 for its refusals. Finally, the school did not provide adequate notice regarding its failure to pay for a private school placement. Other than reporting in the minutes of the IEP meeting that there was no funding support available for the request, the District provided no written document explaining in any detail its reasoning for rejecting the proposed placement.

22. Had the District taken the time to consider fully whether [the student]'s circumstances required a change in his program, and prepared written explanations, it is possible that it might have reached different decisions. In any event, [the student]'s parents would have been in a much better position to challenge the District's decisions if they had been provided with sufficient explanation as to the District's reasoning or lack thereof. The District's procedural violation therefore resulted in denial of [the student]'s right to participate, and also led to a significant loss of educational opportunity.

II. THE DISTRICT FAILED TO DEVELOP AND IMPLEMENT IEPs REASONABLY CALCULATED TO CONFER MEANINGFUL EDUCATIONAL BENEFIT AND TO MEET [THE STUDENT'S] UNIQUE EDUCATIONAL NEEDS

23. The well-established standard for determining substantive compliance with the IDEA, is that the IEP must confer meaningful educational benefit. A school district cannot "discharge its duty under the IDEA by providing a program

1 that produces some minimal academic advancement, no matter how trivial.”
2 *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001), *quoting*
3 *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985); *see also Polk*
4 *v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3rd Cir. 1999).

5 24. While a District is not required to provide the “best” or “potential-
6 maximizing” education, it must provide services to enable the student to derive
7 meaningful educational benefit in relation to his unique educational needs. *Seattle*
8 *Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996). The term “unique
9 educational needs” is not limited to academic benefit. Rather, it is “broadly
10 construed to include the handicapped child's academic, social, health, emotional,
11 communicative, physical and vocational needs.” *Id.* other citations omitted.

12 25. In conducting the inquiry regarding educational benefit, “courts
13 should heed the congressional admonishment not to set unduly low expectations
14 for disabled children.” *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862-
15 64 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 422 (Oct. 11, 2005).

16 26. “At the very least, the intent of Congress appears to have been to
17 require a program providing a meaningful educational benefit towards the goal of
18 self-sufficiency.” *Deal*, 392 F.3d at 864. Where the difference in the level of
19 education provided can mean the difference between self-sufficiency and a life of
20 dependence, there is strong support for a standard which is higher than “any” or
21 “some” educational benefit. *Deal*, 392 F.3d at 863.

22 27. In evaluating whether an educational benefit is meaningful, the benefit
23 “must be gauged in relation to a child’s potential,” and must allow for “meaningful
24 advancement.” *Deal*, 392 F.3d at 864, *citing Polk*, 853 F.2d at 185

25 **A. THE 2005 IEP**

26 28. The District did not develop or implement the April 2005 IEP to meet
27 [the student]’s unique needs, or to provide meaningful educational benefit. It is
28 undisputed that [the student] is a student capable of performing at his grade level

1 or above; he *could* complete school; and, will live independently. By the spring of
2 2005, however, his anxiety was at a level where he was unable to learn or to do his
3 work. He had already become suicidal and had been hospitalized at Shodair. It
4 was clear at that point that he had serious needs which needed to be met for him to
5 be able to function in the school environment, much less to reach his goals of
6 completing school and living independently.

7 29. Despite [the student]’s obvious needs, and the obvious lack of success
8 of his current 2004 IEP, the District decided not only to keep [the student]’s
9 educational placement substantially the same as it had been in the past (i.e. in
10 regular education classes with accommodations), but to cut services that were in
11 the current IEP. The 2005 IEP is virtually identical to the 2004 IEP except that it
12 no longer provides for direct services in the area of speech and language, or
13 provides any annual goals or objectives in the area of pragmatic
14 language/communication-interaction, nor does it specify any services in the area of
15 study skills. The only new component was the Positive Behavior Support Plan,
16 which simply stated that [the student] would be allowed to go to the nurse’s office
17 if he had a panic attack. Given the failure of the 2004 IEP, it was not reasonable to
18 expect that the 2005 IEP would provide a FAPE. *See J.P. v. Hanover County*
19 *School Bd.*, 447 F. Supp.2d 553, 574 (E.D. Va. 2006) (parents are not required to
20 “stand by and watch while a school system implements the same IEP that has
21 provided no educational benefit in the preceding year.”)

22 30. The 2005 IEP was not reasonably calculated to meet [the student]’s
23 needs. It is undisputed that [the student]’s social skills and pragmatic
24 communication skills were lacking, and were a significant contributor to his
25 anxiety and lack of success. To function, it was crucial that [the student] receive
26 direct assistance and training in appropriate social and communication skills.
27 Indeed, both of [the student]’s prior CST reports had noted that [the student]
28 needed such services. [The special education administrator] admitted that [the

1 student] needed social skills training. By failing to provide such services, the IEP
2 failed to meet one of [the student]’s primary needs.

3 31. Another of [the student]’s primary needs was to develop coping skills
4 to deal with his anxiety, and to learn not let anxiety prevent him from functioning.
5 Dr. Dixon had recommended, as early as 2002, that [the student] be provided
6 regular psychological counseling. In March 2005, [school psychologist #1]
7 observed that it was “critical that . . . therapeutic intervention be provided.”
8 Exhibit 11 at 22. [The student]’s parents provided such counseling once a week,
9 first through Pat Kemp and then Eric Wahler, but this was not sufficient. Wahler
10 explained that even if he had been able to meet with [the student] three times a
11 week, this would not have been sufficient. What [the student] needed was for
12 someone to be available in the school environment to provide immediate feedback.
13 Wahler Depo. at 29-30. [The student]’s parents repeatedly requested that this
14 service be provided, yet the District refused. Instead, the District’s plan was
15 simply for [the student] to go to the nurse’s office when he had a panic attack.
16 This simply did not help [the student] to develop the coping skills he needed.

17 32. It is well-known that NLD children have difficulty in a large school
18 setting and in large classrooms. [The student] had not been able to participate
19 successfully in a regular education classroom since the previous semester. Yet his
20 IEP did not provide for a smaller learning environment for [the student], or one-on-
21 one services.

22 33. It is undisputed that [the student] is capable of performing at or above
23 grade level, if provided a suitable environment. An objective in [the student]’s
24 2004 IEP was that he maintain at least a B average each quarter. Yet in the 2005
25 IEP, this objective was removed. Indeed, the new IEP contained no goal
26 concerning [the student]’s grades.

27 34. Not only was the 2005 IEP not developed to meet [the student]’s
28 needs, it was not implemented in a manner to meet his needs. The IEP listed

1 several accommodations and modifications to be provided to [the student], yet
2 these were not provided in a consistent manner. Indeed, [the student]’s case
3 manager admitted that for most of his “accommodations and modifications” he was
4 treated just the same as other students. [The student]’s mother personally observed
5 that [the student] was not being provided the preferential seating that he needed.
6 This was a material failure, as these accommodations were essential elements of
7 the IEP. *See Van Duyn v. Baker Sch. Dist.* 481 F.3d 770, 779-80 (9th Cir. 2007)
8 (material failure to implement IEP results in denial of FAPE). [The student]’s
9 teachers were not sufficiently informed of his needs so that they could attempt to
10 properly accommodate those needs. *See supra*, Findings of Fact at ¶ 43. Indeed, it
11 would have been difficult for his teachers to be sufficiently informed, when [the
12 student]’s case manager admitted she had no contact with [the student] in seventh
13 grade and did not even understand the severity of his disability until more than
14 halfway through the year.

15 35. The subsequent amendments to the IEP were similarly insufficient.
16 The IEP was amended in January 2006 to provide after-school tutoring and two
17 regular classes, with no other changes. This amended IEP suffered from the same
18 deficits as the original. It was even less likely to meet [the student]’s needs
19 because it isolated [the student] from other students, gave him even less
20 opportunity to develop social skills and coping strategies, provided no one-on-one
21 feedback and impeded his limited ability to function in his school environment.
22 *See supra*, Findings of Fact at ¶ 55. The subsequent amendment placing [the
23 student] in the NET program was similarly inappropriate as it continued to deny
24 [the student] the services he needed, and was clearly not designed to meet his
25 special needs. *See id.* at ¶ 69.

26 **B. THE PROPOSED JULY 2006 IEP**

27 36. The proposed July 2006 IEP was not reasonably calculated to provide
28 [the student] educational benefit. By July 2006, [the student] was not able to

1 function in the [the middle school] environment, even during after-school tutoring
2 sessions. Both of [the student]’s treating professionals agreed that it was not likely
3 that he could have attended [the middle school] on a regular basis under the
4 proposed IEP. While it is possible that some of the new elements in the IEP may
5 have helped [the student] if they had been provided a year earlier, by the end of
6 seventh grade, his anxiety and school avoidance had become too entrenched.
7 Indeed, the District’s hope was that [the student] would be able to develop a
8 relationship with [special education teacher #2] in one month’s time that would
9 allow him to enter the building, when [the student] had already been working with
10 therapists for years on this issue with no success. The proposed IEP was simply
11 too little, too late. [The student] had already been through three semesters of
12 failure, lost educational opportunity, and shattered self-esteem.

13 This Hearing Officer finds, based on all the evidence, that it is not likely that
14 [the student] would have received any educational benefit under the IEP proposed
15 in July 2006, because his anxiety would have prevented him from accessing the
16 proposed placement, and the IEP failed to provide the one-on-one services
17 necessary to address his school-related anxiety. Indeed, the proposed placement
18 would likely have been detrimental to [the student] and would have placed him at
19 further risk of suicide. *See supra*, Findings of Fact at ¶ 96.

20 37. Even if [the student] had been able to overcome his anxiety
21 sufficiently to attend [the middle school] on a regular basis, the proposed IEP still
22 was not tailored to meet [the student]’s unique needs. [The student] needed one-
23 on-one services and because they were refused he now needs to be in a small
24 school environment with psychological counseling including constant monitoring
25 and reassurance for his anxiety, by staff who are well-trained in NLD and panic
26 disorder. He needs direct instruction in social skills accompanied by frequent,
27 immediate, and proactive interventions designed to improve his peer interactions
28 and social skills. In short, he needs help learning to manage his anxiety in the hope

1 that he can develop the social competence he will need to renter the District with
2 the one-on-one services he should have been provided from the outset. Without
3 such help, he will not receive any educational benefit, nor will he be prepared for
4 independent living and employment following school. The proposed IEP did not
5 provide such services. See supra, Findings of Fact at ¶ 97.

6 38. In addition, the proposed class schedule in the July 2006 IEP was not
7 appropriate for [the student] and was not tailored to meet his unique needs. [The
8 student]'s learning style is very different from LD students, and an LD classroom
9 was not appropriate for him. [The middle school] staff has admitted this on several
10 occasions. Moreover, those classes were taught at a grade level several years
11 below [the student]'s level. Finally, even though the resource classes were smaller
12 than his regular education classes, they were still too large to permit [the student]
13 to function. *See supra*, Findings of Fact at ¶¶ 98-99.

14 39. Further, the District failed to implement the accommodations and
15 modifications in [the student]'s earlier IEPs. Given this failure, it was reasonable
16 for [the student]'s parents to expect that, even if the IEP was appropriate, it would
17 not be implemented effectively. Finally, [the student]'s parents had experienced a
18 significant lack of understanding on the part of [the middle school] staff
19 concerning the nature and severity of [the student]'s disability, and the repeated
20 failure to comply with the procedural requirements of the IDEA. It was reasonable
21 for them to expect that this pattern would have continued in eighth grade.

22 40. While the IEP informally listed some possible options in the event
23 that the [the middle school] placement did not work, this did not cure the
24 substantive inadequacies of the IEP. First, the IEP contained absolutely no
25 specifics on what any of the proposed alternatives would look like. The offer of
26 several possible placements without any specifics violates the IDEA and is a denial
27 of a FAPE. *Glendale Unified Sch. Dist. v. Almasi*, 122 F. Supp.2d 1093, 1107-08
28 (C.D. Cal. 2000). The District is required to make a specific formal offer. *See*

1 *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994). The District has an
2 obligation to develop an IEP that is reasonably calculated to provide a FAPE, and
3 it cannot escape this obligation merely by saying it will consider other possibilities
4 if the proposed IEP does not result in FAPE. Second, the District did not even
5 commit to providing any of the alternatives on the list – they were simply
6 possibilities that the school would consider. [The student]’s parents had no
7 guarantee that the school would ultimately provide any of the options. It was
8 reasonable for [the student]’s parents to be concerned that an alternative plan
9 would not be developed and implemented in a timely fashion. In seventh grade, it
10 took the whole semester before the District actually implemented the tutoring plan.
11 [The student]’s parents were not required to put [the student] through yet another
12 semester of failure while the District took months to devise and implement a new
13 plan: “The IDEA does not require [the student] to spend years in an educational
14 environment likely to be inadequate and to impede [his] progress simply to permit
15 the School District to try every option short of residential placement.” *Seattle Sch.*
16 *Dist. No. 1 v. B.S.*, 82 F.3d at 1501. Other citations omitted.

17 **III. FRANKLIN ACADEMY WAS A PROPER PLACEMENT FOR [THE** 18 **STUDENT]**

19 41. [The student]’s parents are entitled to receive reimbursement for [the
20 student]’s placement at Franklin if they can show that the District did not make a
21 FAPE available to [the student] in a timely manner, and Franklin Academy is a
22 proper placement for [the student]. *Florence County v. Carter*, 510 U.S. 7 (1993);
23 20 U.S.C. § 1412(a)(10)(C) (1997, 2004); 34 C.F.R. § 300.148(c) (2006). [The
24 student]’s parents have shown that the District did not make a FAPE available.
25 They have also proven that Franklin is a proper placement.

26 42. Dr. Tom Hays and Bridget Corcoran amply described how virtually
27 every aspect of Franklin is specially designed to meet [the student]’s needs. He is
28 being provided with assistance and training to improve his social skills, and to

1 teach him to cope with his anxiety and school avoidance. The physical, social, and
2 educational environmental are specifically designed to meet his unique needs, as is
3 the academic curriculum. Although it has not been easy, and [the student] still
4 struggles, he has made significant progress. He has been able to do his work,
5 attend class, participate in school activities, and to receive an education. Based on
6 this evidence, the Hearing Officer concludes that Franklin is a proper placement
7 for [the student].

8 **IV. [THE STUDENT] HAS MET HIS BURDEN OF PROOF AND HAS**
9 **SHOWN HE IS ENTITLED TO RELIEF, INCLUDING**
10 **REIMBURSEMENT FOR FRANKLIN AND OTHER EXPENSES**

11 43. Under the IDEA, [the student]’s parents were required to prove the
12 inappropriateness of the IEP being provided by the District. *Schaffer v. Weast*, 546
13 U.S. 49 (2005). This Hearing Officer has heard all the evidence, weighed it
14 thoroughly, and has determined that [the student] has proven by a preponderance
15 of the evidence that he was not provided a FAPE by [the middle school], that the
16 IEP proposed in July 2006 was inappropriate, and that Franklin is an appropriate
17 placement for [the student]. Much of the evidence in this case was undisputed. To
18 the extent this Hearing Officer resolved factual questions in [the student]’s favor,
19 these findings were based on a determination that [the student]’s evidence was
20 more thorough, credible and persuasive than the evidence offered by the District.

21 44. If a student is denied a FAPE, a Hearing Officer has broad discretion
22 to grant appropriate relief, including not only prospective relief, but also
23 retroactive reimbursement for all expenses that the parents incurred because of the
24 failure to develop or implement an appropriate IEP. *See generally* 20 U.S.C. §
25 1415; *School Committee of Burlington v. Department of Educ.*, 471 U.S. 359, 369-
26 71 (1985). Compensatory education services can be awarded as appropriate
27 equitable relief for a past denial of a FAPE. *See Park v. Anaheim Union High*
28 *School District*, 464 F.3d 1025, 1033 (9th Cir. 2006). In addition, the IDEA
specifically authorizes the reimbursement of private school expenses if the District

1 has not made a FAPE available and the private school placement is a proper
2 placement. *See* 20 U.S.C. § 1412(a)(10)(C) (1997, 2004); 34 C.F.R. § 300.148(c)
3 (2006).

4 45. This Hearing Officer has determined that the District did not make a
5 FAPE available, and that Franklin is a proper placement for [the student] .
6 Therefore, under Section 1412(a)(10)(C), his parents are entitled to reimbursement.
7 It is well-established that private school reimbursement includes not only tuition,
8 but also any related expenses including room and board, and transportation. *See*
9 *Union School. Dist. v. Smith*, 15 F.3d at 1527-28. [The student]’s parents are
10 entitled to reimbursement for tuition and fees for the 2006-2007 year, and also for
11 all related expenses, including transportation expenses (airfare, lodging and car
12 rental), and also for the laptop computer which is required of Franklin students. If
13 reimbursement were not required under Section 1412(a)(10)(C), [the student]’s
14 parents would be entitled to equitable relief because of the District’s failure to
15 provide [the student] with a FAPE his seventh grade year.

16 46. [The student]’s parents are also entitled to reimbursement for the
17 expenses they incurred during [the student]’s sixth and seventh grade years due to
18 the District’s failure to provide a FAPE. The IDEA requires that psychological
19 counseling be provided at no cost if necessary to assist the child to benefit from
20 special education. *See* 20 U.S.C. § 1401(22)(1997); 20 U.S.C. § 1401(26)(2004).
21 Because of his extreme anxiety and school avoidance issues, [the student] needed
22 mental health counseling to receive a FAPE. Because the District did not provide
23 any such counseling, [the student]’s parents were required to pay for such
24 counseling themselves. They are entitled to reimbursement for the amounts they
25 paid Pat Kemp and Eric Wahler for mental health counseling. Similarly, [the
26 student]’s parents were forced to pay for academic instruction for [the student] at
27 Sylvan because [the student] was not receiving a FAPE at [the middle school].
28 Finally, [the student]’s parents are entitled to reimbursement for the consulting fees

1 they paid to Dr. Yvonne Jones in an effort to educate themselves regarding [the
2 student]'s needs and to help him to obtain a FAPE.

3 **ORDER**

4 Based upon the foregoing Findings of Fact and Conclusions of Law, this
5 Hearing Officer orders as follows:

6 1. The District did not offer an appropriate educational program for [the
7 student] for the 2006-2007 school year.

8 2. The District failed to provide a free appropriate public education to
9 [the student] during the 2004-2005 and 2005-2006 school years.

10 3. The program and placement at Franklin Academy is an appropriate
11 placement to meet [the student]'s needs.

12 4. The District is responsible for paying the tuition and related costs of
13 [the student]'s placement at Franklin Academy for the 2006-2007 school year,
14 including \$61,800 for tuition and fees for the 2006-2007 school year at Franklin;
15 \$9,352.90 for airfare; \$766.90 for lodging and rental care expenses; and, \$2,475.95
16 for computer equipment.

17 5. The District is responsible for reimbursing [the student]'s parents for
18 other expenses they incurred as a result of the District's failure to make a FAPE
19 available, including \$3,640 for the cost of Sylvan Learning Center; \$2,689.50 for
20 the consulting services of Dr. Yvonne Jones; \$435 for mental health counseling
21 services from Eric Wahler; and \$345 for mental health counseling services from
22 Pat Kemp.

23 6. As [the student]'s parents are the prevailing party to this action they
24 are entitled to reimbursement of their reasonable attorneys' fees and costs of suit in
25 accordance with 20 U.S.C. §1415.

26 DATED this ____ day of August, 2007

27
28

Janice Frankino Doggett, Hearing Officer

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that on the ____ day of August, 2007, a true and exact copy of the foregoing was mailed, first class mail, postage prepaid to:

Office of Public Instruction
Legal Division
P.O. Box 202501
Helena, MT 59620-2501

Phillip Hohenlohe
Montana Advocacy Program
400 N. Park 2nd Floor
P.O. Box 1681
Helena, MT 59624

Jeffery Hindoien
Gough, Shanahan, Johnson and Waterman
33 S. Last Chance Gulch
P.O. Box 1715
Helena, MT 59624-1715

DATED this ____ day of August, 2007.

Janice Frankino Doggett, Hearing Officer